

No. 15611

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United States  
Court of Appeals  
for the Ninth Circuit

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HARRY L. MARSHALL, JR.,

Appellant.

vs.

WESTFAL-LARSEN & CO., GENERAL STEAM-  
SHIP COMPANY and BJARNE SELLE-  
VALD,

Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.

FILED

AUG 27 1957

PAUL P O'BRIEN, CLERK



No. 15611

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## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer .....	7
Attorneys, Names and Addresses of.....	1
Certificate of Clerk to Record on Appeal.....	121
Complaint .....	3
Decree .....	18
Findings of Fact and Conclusions of Law.....	12
Notice of Appeal.....	19
Order for Transmission of Exhibits.....	20
Statement of Points Relied Upon.....	124
Transcript of Proceedings.....	21
Witnesses, Libelant's:	
King, Dr. Don	
—direct .....	104
—cross .....	113
Marshall, Harry L.	
—direct .....	36, 116
—cross .....	62, 119
Witness, Respondent's:	
Nelson, Jan Arthur	
—direct .....	80
—cross .....	85



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For Respondents & Appellees.





In the District Court of the United States in and for  
the Northern District of California, Southern  
Division

No. 27475

HARRY L. MARSHALL, JR.,

Plaintiff,

vs.

WESTFAL-LARSEN & CO., a Corporation; GEN-  
ERAL STEAMSHIP COMPANY, a Corpora-  
tion, and BJARNE SELLEVALD,

Defendants.

COMPLAINT TO RECOVER  
FOR PERSONAL INJURIES

Harry L. Marshall, Jr., in a cause of contract and  
damage, civil and maritime, alleges:

I.

Plaintiff is a resident of the City and County of  
San Francisco, within the Northern District of Cali-  
fornia, Southern Division.

II.

On or about December 17, 1954, defendant West-  
fal-Larsen & Co., was the owner, the defendant  
General Steamship Company, was the operator and  
defendant Bjarne Sellevold, was the master of that  
certain vessel known as M. S. Hardanger.

III.

On or about February 1, 1955, said vessel was em-  
ployed in foreign commerce.

## IV.

Sometime prior to December 17, 1954, at San Francisco, California, the defendants agreed to transport plaintiff and plaintiff, pursuant to said agreement, became a passenger on said vessel on or about December 17, 1954.

## V.

Transportation of plaintiff by the defendants was conducted by the defendants as a regular scheduled transportation as a common carrier for hire.

## VI.

On or about February 1, 1955, the plaintiff, while a passenger of said vessel, suffered severe personal injuries when he fell while debarking from said vessel at Corral, Chile. Plaintiff's said injuries were caused by the negligence and carelessness of the defendants, their agents, servants, officers and employees, in that they failed to furnish plaintiff with a safe means of debarking from said vessel during a temporary stop-over at Corral, Chile, and failed to take reasonable measures to safeguard plaintiff when plaintiff was debarking at said time and place in that they failed to provide competent officers and employees to superintend and supervise the debarking of passengers at Corral, Chile, even though said defendants, their agents, servants, officers and employees, knew or should have known, that plaintiff intended to, and was in the act of debarking from said vessel at said time and place, and

as a result thereof plaintiff fell while debarking from said vessel at Corral, Chile.

## VII.

By reason of the premises, plaintiff suffered a torn ligament and cartilage of the left knee and was otherwise rendered sick, sore, lame and disabled and has suffered, and will in the future suffer, great pain and disability; and in connection with said injuries has expended the sum of \$1,218.43 for the services of doctors, nurses and hospitals to treat the injuries sustained by plaintiff, which said sum is the reasonable value for the services so rendered to plaintiff for said injuries.

## VIII.

The matters herein alleged are within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

## IX.

Plaintiff is informed and believes, and therefore alleges, that defendant Westfal-Larsen & Co. is, and at all times herein mentioned was, a corporation qualified to do business in the State of California, and has an office for the purpose of transacting business in this District.

## X.

Plaintiff is informed and believes, and therefore alleges, that defendant General Steamship Company is, and at all times herein mentioned was, a corporation qualified to do business in the State of California and has an office for the purpose of transacting business in this District.

## XI.

By reason of the premises aforesaid and as a direct and proximate result thereof and in addition to the special damages heretofore alleged, plaintiff has been generally damaged in the sum of \$15,000.00.

As and for a Second, Separate and Distinct Cause of Action, Plaintiff Alleges:

## I.

Plaintiff refers to paragraphs I, II, III, V, VI, VII, VIII, IX, X and XI of the first cause of action herein and by this reference incorporates said paragraphs, and each of the allegations thereof, in this, the second cause of action, as though said paragraphs and the allegations therein were expressly and fully set forth in haec verba herein.

## II.

Sometime prior to December 17, 1954, the defendants agreed to transport plaintiff safely from Los Angeles, California, around South America and return to Los Angeles and plaintiff, pursuant to said agreement became a passenger in said vessel on or about December 17, 1954.

Wherefore, Plaintiff prays that the defendants be required to appear and answer, all and singular, the matters aforesaid and that this Court make and enter its decree awarding plaintiff damages in the sum of \$16,218.43, together with costs, and that plaintiff have such other and further relief as the Court may deem meet and proper in the premises.

Dated : October 31st, 1955.

/s/ MORSE ERSKINE,

ERSKINE, ERSKINE &

TULLY,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed February 18, 1957.

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[Title of District Court and Cause.]

### ANSWER

Westfal-Larsen & Co., a corporation, answering unto the complaint herein, admits, denies and alleges:

#### I.

Admits the allegations of Paragraph I.

#### II.

Denies each and every allegation of Paragraph II except admits that defendant Westfal-Larsen & Co. was the owner and operator of the MS Hardanger, and Bjarne Sellevold was the master.

#### III.

Admits the allegations of Paragraph III.

#### IV.

Admits the allegations of Paragraph IV, and in this behalf alleges that the agreement to transport

plaintiff was contained in a contract passage ticket issued to and binding upon plaintiff.

V.

Denies each and every allegation of Paragraph V except admits that transportation of plaintiff was conducted under and pursuant to the terms of the contract passage ticket.

VI.

Denies each and every allegation of Paragraph VI except admits plaintiff injured his left knee on or about February 1, 1955, when he jumped from said vessel to a barge at Corral, Chile.

VII.

Denies each and every allegation of Paragraph VII except admits plaintiff injured his left knee.

VIII.

Admits the allegations of Paragraph VIII.

IX.

Denies each and every allegation of Paragraph IX.

X.

Admits the allegations of Paragraph X.

XI.

Denies each and every allegation of Paragraph XI and further denies plaintiff has been generally or otherwise damaged in the sum of \$15,000, or any sum, or at all.



Answering Unto Plaintiff's Separate, Second and Distinct Cause of Action, Defendant Westfal-Larsen & Co. Admits, Denies and Alleges:

I.

Defendant refers to Paragraphs I, II, III, V, VI, VII, VIII, IX, X and XI of its answer to the first cause of action herein and by this reference incorporates herein said paragraphs and each of the admissions, denials and allegations thereof.

II.

Denies each and every allegation of Paragraph II except admits defendant agreed to transport plaintiff as a passenger pursuant to the terms and limitations of a contract passage ticket issued to plaintiff.

And for a Further, Separate and Second Answer and Defense to the Complaint and to Each Cause of Action, Defendant Westfal-Larsen & Co. alleges:

I.

That any accident or injuries suffered by plaintiff at or about the time or place alleged in the complaint were caused by and/or contributed to by the carelessness and negligence of plaintiff and plaintiff was careless and negligent in that he placed himself in a position of danger and failed to exercise due or any care for his own safety at the time and place alleged in the complaint.

And for a Further, Separate and Third Answer and Defense to the Complaint and to Each Cause of Action, Defendant Westfal-Larsen & Co. alleges:

I.

That the rights of the plaintiff in respect to any accident or injuries occurring to plaintiff during and about the time and place alleged in the complaint were limited to and controlled by the terms and provisions of the contract passage ticket issued to plaintiff, and that by virtue of said terms and provisions there is no liability of this defendant to plaintiff.

And for a Further, Separate and Fourth Answer and Defense to the Complaint and to Each Cause of Action, Defendant Westfal-Larsen & Co. alleges:

I.

That plaintiff was a passenger on said vessel under and pursuant to the terms and limitations of the contract passage ticket issued to plaintiff and that as such passenger and pursuant to said contract plaintiff accepted and bore the risk of transfer between vessel and shore and vessel and vessel.

And for a Further, Separate and Fifth Answer and Defense to the Complaint and to Each Cause of Action, Defendant Westfal-Larsen & Co. alleges:

I.

That plaintiff was a passenger on said vessel under and pursuant to the terms and limitations of



the contract passage ticket issued to plaintiff and that under said contract plaintiff agreed that even in the event of liability for injury the damages recoverable should not exceed \$5,000 unless plaintiff paid an increased amount or percentage at the time the ticket contract was purchased; that plaintiff did not pay said increased amount of percentage and in the event of defendant's liability hereunder plaintiff is limited to his actual damages, not exceeding \$5,000.

Wherefore, defendant prays that plaintiff take nothing by his complaint herein, that defendant be dismissed with judgment for its costs of suit herein incurred, and for such other and further relief as in law and justice they may be entitled to receive.

LILLICK, GEARY, OLSON,  
ADAMS & CHARLES,

/s/ EDWIN L. GERHARDT,  
Attorneys for Defendant  
Westfal-Larsen & Co.

State of California,  
City and County of San Francisco—ss.

Edwin L. Gerhardt, being first duly sworn, deposes and says:

That he is a member of the firm of Lillick, Geary, Olson, Adams & Charles, attorneys for Westfal-Larsen & Co., defendant in the within action; that the office of said attorneys is within the City and County of San Francisco; that this verification is

made by affiant for the reason that there is no officer of said defendant within the City and County of San Francisco; that he has read the within Answer and knows the contents thereof; that the same is true of his knowledge except as to matters alleged upon information and belief, and as to those matters he believes it to be true.

/s/ EDWIN L. GERHARDT.

Subscribed and sworn to before me this 19th day of March, 1956.

[Seal]      /s/ IRENE M. WOOD,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires June 23, 1958.

[Endorsed]: Filed February 18, 1957.

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[Title of District Court and Cause.]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on regularly for trial before the court sitting without a jury the Libelant Harry L. Marshal, Junior, appearing by Erskine, Erskine & Tulley by Morse Erskine, Esq. and Respondent Westfal-Larsen & Co., appearing by Lillick, Geary, Wheat, Adams & Charles by Edwin L. Gerhardt, Esq. and evidence both oral and documentary having been introduced the matter having been argued

and the cause submitted for decision, the Court having been fully advised in the premises now makes its findings of fact and conclusions of law as follows:

### Findings of Fact

1. When the Complaint in this action was filed it was docketed by mistake as a civil action; and so at the commencement of the trial the court on motion ordered that it be transferred to the admiralty side of the court. On the pleading the parties are designated "Plaintiff" and "Defendant." To conform to the practice in this District they should have been designated "Libelant" and "Respondent" and therefore they are so designated in the latter manner in these Findings and in the Decree to be made pursuant to these Findings.

2. At all times herein Libelant was a resident of the City and County of San Francisco within the Northern District of California, Southern Division.

3. At all times herein Respondent Westfal-Larsen & Co. owned and operated the MS Hardanger which was employed in foreign commerce.

4. This matter is at issue only between Libelant and Respondent Westfal-Larsen & Co. and not at issue between Libelant and General Steamship Company, Bjarne Sellevold and the latter two parties are dismissed.

5. Respondent Westfal-Larsen & Co. was a common carrier for hire.

6. On February 1st, 1955, Libelant was a passenger on said vessel pursuant to contract passenger's ticket No. 0045. On said day said vessel was anchored at Corral, Chile. During the early morning of said day Libelant and the Master, Bjarne Sellevald, left said vessel to go ashore via a small tug. At the time of disembarking the gangway of said vessel was so rigged as to permit access to a barge on the portside of said vessel. In order to reach the shore tug it was necessary to descend said gangway to the barge and cross the barge to the tug.

7. At the time the weather was clear and dry. There was a swell to the sea and therefore the barge was moving up and down under said gangway from two to three feet. Libelant was aware of these conditions.

8. As Libelant descended the gangway the Captain was behind him. Mr. Nordfonn and Mr. Nilsen, two seamen, from the vessel were on the barge engaged in scraping and painting the side of the vessel. Assistance was available to Libelant in reaching the barge, if he wished it. When Libelant reached the lower platform of said gangway Mr. Nilsen called to him "Don't jump." Libelant disregarded said warning and jumped from the gangway platform to the barge, while said barge was rising on a swell and before it had reached its crest.

9. Libelant jumped at right angles to the vessel and in a direction across the barge, but when he landed he was at an angle somewhat facing the hold. He was then pitched by the movement of the barge

to his left. Libelant in order to avoid being thrown down the forward hold of the barge turned sharply twisting his left knee and sustained injuries to his left knee consisting of a tear of the anterior cruciate ligament. He proceeded across the barge to the tug with the Captain and went ashore where he received medical attention. Libelant then returned to the vessel.

10. Libelant admitted to Captain Sellevald and Chief Officer Kaldefoss that the accident was his fault.

11. Libelant subsequently left the vessel at Buenos Aires for medical attention and then returned to San Francisco by plane. Libelant was reimbursed for the remaining unused portion of his passage ticket.

12. An operation was performed to Libelant's knee on March 7th, after he returned to San Francisco and a tear of the anterior cruciate ligament was repaired. Libelant fully recovered from said operation and has no further disability. Libelant's special damages amount to \$1,218.43.

13. Libelant in disembarking from said vessel did not exercise the care of a reasonably prudent person.

14. Libelant has failed to prove and it is not true that Respondent failed to furnish Libelant with a safe means of disembarking from said vessel at Corral, Chile.

15. Libelant has failed to prove and it is not true that Respondent failed to take reasonable meas-



ures to safeguard Libelant while he was disembarking at Corral, Chile.

16. Libelant has failed to prove and it is not true that Respondent failed to provide efficient officers and employees to superintend and supervise his disembarking at Corral, Chile.

17. Such injuries as Libelant received were proximately caused by and the result of his own negligence.

18. Libelant's accident or injury was in no way caused or contributed to by any unseaworthiness of the MS Hardanger.

19. Libelant's accident or injury was in no way caused or contributed to by any negligent act or omission of Respondent, its agents, master, officers, crew or employees.

#### Conclusions of Law

1. This matter is within the Admiralty and Maritime jurisdiction of this Court and the Court has jurisdiction of the parties.

2. Libelant has not sustained his burden of proof.

3. Respondent has not breached any duty of care owed to Libelant.

4. Libelant's injuries were in no way caused by or contributed to by any unseaworthiness of the MS Hardanger, its appliances, appurtenances and equipment.

5. Libelant's injuries were in no way caused or contributed to by any negligent act or omission of Respondent, its agents, master, officers, crew or employees.

6. The proximate and controlling cause of Libelant's injuries was Libelant's own negligence and carelessness.

7. Libelant is not entitled to recover any damages from Respondent.

By Reason Whereof a decree should be entered that Libelant take nothing from Respondent, that judgment be entered against Libelant and in favor of Respondent, each of the parties paying his or its own costs.

Dated May 8, 1957.

/s/ MICHAEL J. ROCHE,  
United States District Judge.

Approved as to form:

/s/ MORSE ERSKINE,  
ERSKINE, ERSKINE &  
TULLEY,  
Proctors for Libelant.

LILLICK, GEARY, WHEAT,  
ADAMS & CHARLES,  
Proctors for Respondent.

[Endorsed]: Filed May 8, 1957.

Entered May 9, 1957.

In the United States District Court for the  
Northern District of California, Southern  
Division

No. 27475

HARRY L. MARSHALL, JR.,

Libelant,

vs.

WESTFAL-LARSEN & CO., a Corporation;  
GENERAL STEAMSHIP COMPANY, a Cor-  
poration, and BJARNE SELLEVALD,

Respondents.

### DECREE

The above-entitled matter having come on regularly for trial before The Honorable Michael J. Roach and the Libelant, Harry L. Marshall, Jr., having appeared in person and by Erskine, Erskine & Tulley by Morse Erskine, Esq., and the Respondent Westfal-Larsen & Co., having appeared by Lillick, Geary, Wheat, Adams & Charles by Edwin L. Gerhardt, Esq., Proctors for Respondent, and evidence both oral and documentary having been introduced and the matter having been argued and the cause submitted for decision, the Court having been fully advised in the premises made, signed, ordered and filed herein the findings of fact and conclusions of law which are by reference made a part hereof.

Now Therefore by reason of the law and the evidence and upon the findings of fact and conclusions of law herein;



It Is Hereby Ordered, Adjudged and Decreed that Libelant Harry L. Marshall, Jr., take nothing from the Respondent Westfal-Larsen & Co., and that Judgment be entered against said Libelant and in favor of Respondent and that the respective parties pay their own costs.

Dated May 8, 1957.

/s/ MICHAEL J. ROCHE,  
United States District Judge.

Approved as to form:

/s/ MORSE ERSKINE,  
ERSKINE, ERSKINE &  
TULLEY,  
Proctors for Libelant.

LILLICK, GEARY, WHEAT,  
ADAMS & CHARLES,  
Proctors for Respondent.

[Endorsed]: Filed May 8, 1957.

Entered May 9, 1957.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice Is Hereby Given that Harry L. Marshall, libelant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 9th day of May, 1957.

Dated: May 31, 1957.

/s/ MORSE ERSKINE,

ERSKINE, ERSKINE &  
TULLEY,

Attorneys for Libelant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 3, 1957.

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[Title of District Court and Cause.]

### ORDER FOR THE TRANSMISSION OF EXHIBITS

It appearing that the libelant in the above-entitled action has appealed to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered against libelant in the above-entitled action; and it appearing to this court that the original exhibits introduced in evidence upon the trial of said action, or marked for identification therein, should be inspected by said Court of Appeals.

Now, Therefore, It Is hereby Ordered that the Clerk of this court, upon transmitting to said Court of Appeals the record on appeal in said action, shall transmit to said Court of Appeals for use upon said appeal all said exhibits, and that when said appeal shall have been decided, said Clerk shall obtain said exhibits from the Clerk of said Court of Appeals so that the same can again be filed in this court.

Dated: June 24, 1957.

/s/ MICHAEL J. ROCHE,  
Judge of the United States  
District Court.

[Endorsed]: Filed June 24, 1957.

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In the United States District Court for the  
Northern District of California, Southern  
Division

In Admiralty No. 27475

HARRY L. MARSHALL, JR.,

Libelant,

vs.

WESTFAL-LARSEN & CO., a Corporation;  
GENERAL STEAMSHIP COMPANY, a Cor-  
poration, and BJARNE SELLEVALD,

Respondents.

PROCEEDINGS OF TRIAL

February 18, 1957

Appearances:

For the Libelant:

ERSKINE, ERSKINE & TULLEY, by  
MORSE ERSKINE, ESQ.

For the Respondents:

LILLICK, GEARY, WHEAT, ADAMS &  
CHARLES, by  
EDWIN L. GERHARDT, ESQ.

The Clerk: Harry L. Marshall vs. Westfal-Larson & Co. for trial.

Mr. Erskine: Ready for the plaintiff, your Honor.

Mr. Gerhardt: Ready for the defendant, your Honor.

The Court: Proceed, gentlemen.

Mr. Erskine: Well, your Honor, I wasn't going to raise this point at this time, but Mr. Gerhardt suggested I should do so. I know it will come up some time during the course of the trial, and as long as he wants me to raise it now, I might as well do so.

The complaint that was filed here was given a Civil number, but it was commenced as an action in Admiralty—suit in Admiralty. It alleges at the beginning of it that this is in a cause “Harry L. Marshall, Jr.,” a cause of contract and damage, civil and maritime. Then it goes along to allege in accordance with the Admiralty Rules the places of residence of the parties, it alleges the jurisdictional fact, which is that the plaintiff, Mr. Marshall, was injured while on a ship, the Hardinger, owned by the defendant Westfal-Larson; and then it alleges that the matters herein alleged are within the Admiralty and Maritime jurisdiction of the United States and this Honorable Court.

That allegation is admitted by the answer. So, at this time, if the Court please, I will ask that this action be transferred from the Civil to the Admiralty side of the court. [2\*]

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: No objection?

Mr. Gerhardt: If your Honor please, this action was filed on the Civil side of the court but contained allegations of Admiralty and Maritime jurisdiction. However, being on the Civil side of the court, and jury having been demanded, when the matter came on for trial there was a stipulation between counsel that the jury could be deemed waived. It therefore remained a case on the civil side of the docket, which was to be tried before a judge alone.

Now, it makes considerable difference in this case, your Honor, whether it is heard as a maritime case or whether it is heard as a Civil case, for this reason:

If after the testimony is presented your Honor should determine that the sole proximate cause of the injury was Mr. Marshall's own negligence, that determination, whether made as wearing Civil robes or Admiralty robes, would terminate the case, and that determination could be made on either side of the court.

If, however, the Court should decide that there was any negligence on the part of the vessel, but that Mr. Marshall was contributorily negligent, then it does make this difference:

If the Court should hear that matter on the Civil side of the court, the contributory negligence of Mr. Marshall could well be a complete bar to any recovery. If, however, it was heard on the Admiralty side of the court, the [3] contributory neg-

ligence of Mr. Marshall would merely result in a reduction or mitigation of the damages.

That is why it is very important to determine in advance whether this matter is going to be heard as a Civil case or as an Admiralty case.

Now, I have conducted considerable research of the authorities, your Honor, and I must admit that in practically all of the cases the transfer from one side of the court to the other is a matter which is within the discretion of the trial court, and I will respectfully have to abide by whatever ruling the Court makes; but I do not consent to the motion that is made and must object to it on a formal basis.

The Court: Well, if you are both agreed that it is a matter of discretion, I am prepared to exercise that discretion. I know nothing about the factual situation, so either side can't be prejudiced.

Mr. Erskine: The intention is clearly stated in the complaint that it was an Admiralty case. It was a mistake that it was filed on the Civil side.

Do I understand that the Court has ruled to transfer it to the Admiralty side?

The Court: So ordered.

Mr. Erskine: Thank you. May I make an opening statement now, your Honor?

The Court: You may. [4]

Mr. Erskine: This is an action by the plaintiff to recover damages for injuries suffered by him while he was a passenger aboard the steamship owned by the defendant Westfall-Larson. The injuries consisted of an injury to his knee which I will describe later on.



The plaintiff boarded the steamship, the Hardinger, the ship of the defendant Westfall-Larson, in Los Angeles, about December 18, 1954. He bought a ticket to travel on this ship down the west coast of South America, through the Straits of Magellan, up the east coast, through the Canal, and back to Los Angeles. In other words, he bought a round-trip ticket. He bought it to go away on a pleasure trip, a vacation.

The ship was to stop on the way down the west coast and up the east coast at various ports, and he, with the other passengers aboard the ship, anticipated getting off at the various places at which the ship would stop in order to see the sights and to learn something about the people and their country at each of these places.

The ship was a freighter. That was its main work, to carry freight. It did, however, carry 12 passengers, of whom the plaintiff was one.

When the vessel would stop at one of these ports of call, it would sometimes stop at a dock where there was a pier. It would dock at a pier where a pier existed at the port of call. But at some of these foreign ports of call there was [5] no dock, and the steamer in those cases would anchor in the harbor, and the passengers when they would go ashore on their sight-seeing would go ashore by means of a shore boat. The shore boat would call at the side of the steamer, the gangway would be let down, and the passengers would get from the gangway onto the shore boat, being helped in moving from the

gangway to the shore boat by officers or members of the crew.

The steamer arrived at a place called Corral. It is a small port in the southern part of Chile. It arrived there about January 29th of 1955. And there being no pier at that place at which a ship of this size could dock, the ship anchored in the harbor.

The passengers went ashore on the 30th and 31st, I believe, and then the first of February arrived. That was the date on which this accident occurred—first of February, 1955. Mr. Marshall and the captain of the ship, Captain Sellevald, had a conversation with one another the night before February 1st. The captain told Mr. Marshall that he was going up to a place called Valdivia, about four or five miles, or perhaps farther, up the river which emptied into the sea at Corral, and he, Marshall, suggested he go with the captain on this trip, or whether the captain asked him to go with him, whether the captain was the one who suggested it, is doubtful according to the testimony.

But at any rate, the captain did say to Marshall, "I would [6] like to have you go with me on this trip up to Valdivia tomorrow morning. We will leave at approximately 7:30 or 7:00 o'clock, probably 7:30, and I will make arrangements for the shore boat to pick us up and take us to shore."

Pursuant to that arrangement the captain and Marshall had breakfast together at 7:00 o'clock on February 1st, and then Marshall went to his cabin for a few minutes and then he went out to the



head of the gangway to go down to the shore boat that was to pick them up.

Now, before I go any further, your Honor, with this statement of what we propose to show, I would like to tell you very briefly the legal theory upon which we are trying this case:

The theory is that a carrier is not an insurer of the safety of its passengers; but it has to exercise the highest degree of care in protecting and safeguarding.

I would like to just pause a minute and read the rule that is stated by the authorities in this connection.

“A carrier of passengers is not an insurer, but does owe the duty to exercise the very high degree of care for the safety of its passengers. A passenger is entitled to have a carrier exercise for his safety as much skill and care and prudence as an exceedingly competent and cautious man would bring to the task of like circumstances, and is liable for injuries to [7] passengers due solely from a failure to do that.” That was from *Moore vs. American Scantic Line*, in 121 Fed. 2d 767 at page 782, decision by Judge Learned Hand, I would like to read one more short extract:

“It was the duty of the master to protect those passengers from harm with the care, skill and prudence which an exceedingly competent and cautious man would bring to the task in similar circumstances.” That is *Voltmann vs. United Fruit Company*, in 147 Fed. 2d 515.

So that is the general rule, that the carrier must

exercise a very high degree of care; that the captain must use the care to protect his passengers of an exceedingly prudent and cautious man.

We also say, if the Court please, that under the law the defendant here had the duty to protect these passengers, reasonably to protect them, in leaving the ship to go ashore; and it was obliged not only to perform that general duty, but it was obliged to supply men, officers or men of the steamer, to aid the passengers in getting from the gangway onto the shore boat or whatever method they were to leave the ship. And it was required to perform that duty of safeguarding the passengers with this highest degree of care imposed upon it by the law.

Now, those are the principles upon which we rely in trying [8] this case.

Getting back to what we propose to show, when Marshall arrived at the head of the gangway on February 1st of 1955, he found Captain Sellevald and the first officer, Kaldefoss, talking with one another at the head of the gangway, and he stepped out—he said, “Good morning” to the first officer and stepped out onto the upper platform of the gangway.

Now, I have agreed with Mr. Gerhardt, if the Court please, to use this sketch of the vessel, the gangway and the barge which is involved in this case, on this trial. The sketch was prepared upon the scale of one-eighth of an inch equals a foot.

Can your Honor see it there?

The Court: For all purposes I can see it.

Mr. Erskine: Do you have something in the nature of a ruler that I can point with?

The Court: There is a pointer down there.

Mr. Erskine: Mr. Marshall stepped out onto the upper platform of the gangway and started down the stairs. He was followed by Captain Selvald. When he got about three-fourths of the way down the stairs, he became aware of the fact that the captain was not following him, but he had returned up the stairs to again talk to the first officer. So Marshall waited about three-quarters of the way down the gangway until the Captain had finished his brief conversation with the first [9] officer. The captain then started to descend again, and Marshall again started to descend until he got to the lower platform of the gangway. He paused a moment there.

The captain was about three or four steps up the gangway from him. There was this barge which was 100 feet long and about 20 or 25 feet wide, alongside the ship, about a foot and a half from the ship and under the gangway. Marshall saw the shore boat either tied up to the other side of the barge or coming into the barge at the time he was on the lower platform. The barge was about two or three feet below. The deck of the barge was about two or three feet below the lower platform of the gangway.

There was a swell or a wave. There were waves in the sea that were about three feet from the crest to the hollow of the wave, and those waves were

moving this barge about a foot and a half to two feet, two and one-half feet, up and down.

Now, that was the condition, that Marshall was on the lower platform of the gangway with the captain behind him. We will show that the First Mate of the ship testified that when a gangway is lowered above a barge in that position, that the lower platform of the gangway is fixed at a point where it is sufficiently high above the barge so that the motion of the sea will not raise the barge up to strike and injure the gangway. In other words, the lower platform of [10] the gangway is kept up far enough so that there is no danger that the barge will be lifted by a wave and strike the gangway.

We will show that no effort was made when Marshall was going down the gangway, or appeared to go down the gangway to get on the barge, no effort was made to lower the gangway so that it would be close to the deck of the barge. We will show that when he was going down the gangway with the captain behind him, no effort was made to get anybody onto the deck of the barge to help him down from the lower platform to the deck of the barge.

He was standing there looking at the deck of the barge and noticing the movement of the barge, with the captain immediately behind him, and the captain did not say a word to him; the first officer didn't say a word to him; and so he, not getting from anybody any directions, jumped from the lower platform of the gangway down to the deck of the barge.

Now, when he struck the deck of the barge, a

wave gave the barge a movement that caused him to pitch. He jumped directly out from the side, at right angles to the side of the ship, and he struck the deck about in here, near this forward hold. The forward hold was empty. There was what is called a coaming surrounding the forward hold about two feet high.

A coaming is a little fence-like structure that is built around open hatches of a ship. [11]

So he, jumping straight out, landed on the deck near this forward hold, and at the time he landed he was pitched by the movement of the barge, pitched over toward this coaming and over toward this empty hold that was about 15 to 20 feet deep, at least. He, in order to save himself, turned very sharply on his left knee.

He didn't strike the coaming, but he turned with his full strength and weight of his body on his left knee, and he was really bending over this coaming in order to save himself from falling down the hold, and he gave his left knee such a severe twist that he broke what they call the anterior cruciate ligament of his left knee. The anterior and posterior cruciate ligaments bind the thigh bone to the shin bone—the doctors say the “femur to the tibia.” It's a rope-like structure. I guess it's about as thick as that (demonstrating).

Marshall, in that turn to avoid being thrown down the hold, did break that ligament. Of course, he didn't know at that time that he had broken it, but that is what the evidence will show happened to him.



After making that twist he fell on his hands and knees on the deck. He didn't hurt himself in the fall at all. It was the twist of his body that broke the ligament. He got up feeling great pain. He got up and by that time the captain had jumped immediately following him, and the captain asked him whether or not he wanted to go back to the ship, and [12] Marshall said, "Well, there's no doctor aboard the ship. I better go ashore and see a doctor."

So they got in the shore boat and he went over to Corral, and then they left the shore boat at Corral and took a river boat that took them up to Valdivia. By the time they got to Valdivia, Marshall's knee was very, very badly swollen. It was full of blood. They went to a hospital at Valdivia. The doctor there aspirated the blood, that is, he stuck a needle into Marshall's knee and drew off the blood, and put the knee in a cast, and then Marshall was taken back to the ship.

The ship continued around through the Straits of Magellan to a place called Bahia Blanca, near Buenos Aires. A doctor came aboard there, took a look at Marshall's knee, again took off the blood, removed the cast, then Marshall and the steamer went up to Buenos Aires.

Marshall got off the steamer there and went up to the hospital there, and the doctor at the hospital diagnosed his trouble as either a broken cartilage or broken ligament, and he took an airplane from Buenos Aires back to San Francisco where he arrived about the first of March.

He went out to see Dr. King at the Stanford Hospital, and Dr. King then operated on his knee and found this broken cruciate ligament and repaired it by sewing it together, and Marshall then underwent considerable physiotherapy, and by July the 1st of 1955, his treatment was finished. [13]

He hasn't much residual difficulty with his knee. It is painful to the touch and he feels it at times of weather, but he now has complete use of his knee subject to those exceptions.

That is the case we propose to prove, if the Court please.

Mr. Gerhardt: May it please your Honor, Mr. Erskine has given quite a fair summary of the facts with about three exceptions, which are additions, actually, to the facts which he has stated.

First of all, I should like to correct an impression, or perhaps—I don't think it was a direct misstatement on Mr. Erskine's part, but he has stated there were three-foot waves. I think in this case, your Honor, the evidence will show that these were not waves in the ordinary sense of breaking waves. These were more harbor swells.

Mr. Erskine: Swells. Those are waves, but they are not breaking waves.

Mr. Gerhardt: Yes. Insofar as the diagram is concerned, your Honor, I do agree that that has been drawn to scale, but the distances used as the basis for the scale are merely approximations taken from the various witnesses. There may be a difference of a foot or two here or there, but it is primarily for illustration purposes that I understand

it is intended to be used, and I have stipulated that it is drawn to scale according to approximations given by various witnesses. [14]

Now, insofar as the statement was made that there was nobody on the barge——

Mr. Erskine: I didn't say that, Mr. Gerhardt. I said that neither the captain nor the first mate put anybody on the barge to help Marshall off the barge.

Mr. Gerhardt: Well, the evidence will show, your Honor, that Mr. Marshall denies there was anybody on the barge, denies that anybody on the barge spoke to him or gave him any warning whatsoever. The evidence of the respondent will, however, show that there were two men on the barge, located on this side of the barge, next to the side of the vessel, and within a few feet of the foot of the gangway. That these men were down there engaged in the job of painting and scraping the side of the vessel, using the barge as a floor from which to conduct those working operations.

The evidence will show that after Mr. Marshall came down and stood on the lower platform, and because of the movement of the barge, one of these seamen, whose name was Jan Nelson, warned Mr. Marshall not to jump. That Mr. Marshall, despite that warning, despite the statement from the seaman not to jump, nevertheless did so, and that it was Mr. Marshall's own action in jumping at that moment that caused his injury.

We will also show, your Honor, that in the conversation that Mr. Marshall had with the master and



the chief officer subsequent to his return to the vessel after receiving medical [15] treatment he admitted it was his own fault.

We will also show, your Honor, that there was a passage contract effected in this case, and that that contract was signed by Mr. Marshall, and that one of the terms of that contract was to the effect that passengers would all bear any risk of transfer between vessel and vessel or vessel and shore.

I think, your Honor, that with those modifications to Mr. Erskine's opening statement, otherwise the facts will be quite well along the lines that were stated.

Mr. Erskine: I have one remark—I don't know whether it will help your Honor, but I would like to say that we do not agree with Mr. Gerhardt's statement with respect to the position of these men on the barge or what was said to Mr. Marshall.

Our position with respect to the provisions of the ticket is that under the express statutes of the United States that provision is void as against public policy.

Now, Mr. Marshall, will you take the stand, please? [16]

## HARRY L. MARSHALL

libelant herein. called as a witness in his own behalf: sworn.

The Court: Your full name, please.

A. Harry L. Marshall, Jr.

## Direct Examination

By Mr. Erskine:

Q. Your address, Mr. Marshall?

A. 2677 Larkin Street.

Q. Just to pass over these preliminaries with leading questions, if counsel has no objection, you boarded the steamship Hardinger in Los Angeles about December 18, 1954, is that correct?

A. Yes, sir.

Q. You boarded her as a ship passenger?

A. Yes.

Q. You bought a passage on that steamer to go along through the Straights of Magellan?

A. Yes.

Q. You stopped at various ports of call on both the west and east coasts of South America?

A. Yes, sir.

Q. Now, you have prepared a statement of the ports at which you stopped while you were on this ship. I would like to show you this statement, Mr. Marshall, and ask you if that statement shows correctly the ports at which the steamer stopped while you were a passenger aboard her, and the [17] length of the stay of those places.

(Testimony of Harry L. Marshall.)

Mr. Erskine: I will show it to you as soon as he examines it, counsel.

The Witness: Yes, Mr. Erskine, that's right. According to my records these are correct. It is a sort of a diary record, the ship's log I think would prove it.

Mr. Gerhardt: Mr. Marshall, is that based upon recollection?

A. No, no, this is based on the record of a passenger and he gave me a copy when I was aboard ship.

Mr. Gerhardt: No objection.

Mr. Erskine: I would like, if the Court please, in order to abbreviate this thing, to introduce this in evidence.

The Court: It may be admitted and marked.

(List referred to above admitted into evidence as Libelant's Exhibit 2.)

Mr. Erskine: It shows, if the Court please, that the steamer stopped at Buena Ventura, Colombia, December 28 to 30th; Manta, Ecuador, December 31st to January 1st; Para, Ecuador, January 2nd; Talara, Peru, January 3rd; Paita, Peru, January 3; Callo, Peru, January 5th to 9th; Iquique, Peru, January 12th; Antofagasta, Peru, January 14th; Valparaiso, Chile, January 17th and 18th; Corral, Chile, January 29th to February 3rd; Bahia Blanco, Argentina, February 9th to 14th; and Buenos Aires, Argentina, February 16th. [18]

Q. (By Mr. Erskine): Now, Mr. Marshall, you

(Testimony of Harry L. Marshall.)

arrived at Corral, then, this port in Chile, around January 29th, is that correct?      A. Yes.

Q. And did you and the other passengers go ashore at Corral prior to February 1st, 1955?

A. Yes.

Q. When the steamer stopped at Corral, did she dock at a pier or was she out in the harbor?

A. She was in the harbor at anchor.

Q. Have you any idea how far off shore she was?

A. Oh, I think it's about a quarter of a mile.

Q. And when you and the passengers went ashore prior to January 1st, how did you go ashore?

A. A little shore boat would come up alongside the gangplank and we would step on the gangplank and onto the little shore boat.

Q. And you were taken ashore that way?

A. That is right.

Q. Do you remember going ashore in Corral on February 1st?      A. Yes.

Q. Did you have a conversation with the Captain of the vessel on the evening preceding February 1st?      A. Yes, sir.

Q. What was the name of that Captain? [19]

A. Captain Sellebole.

Q. Captain S-e-l-l-e-b-o-l-e, is that right?

A. Yes.

Q. Where did you have that conversation with him, Mr. Marshall?

A. It's not exactly clear, but I think it was in

(Testimony of Harry L. Marshall.)

my cabin. He often came into my cabin and I would go into his cabin.

Q. That was after dinner?

A. That was after dinner, I believe.

Q. Was anybody else there besides you and the Captain?        A. No, sir.

Q. Tell us what that conversation was.

A. Well, he told me he was going up to Valdivia, which was up the Valdivia River from Corral about 8 or 10 miles. He was going up early in the morning to see the agent there, and he was planning to stop for lunch either going or coming down at a farm there owned by some Dutch people who were friends of his.

Well, I showed an interest in it. Whether he invited me before I showed the interest, I don't know, but anyway it was arranged that I was to have an early breakfast with him an hour before the passengers, in the dining salon, and he would arrange for a boat and we would go ashore and get the regular boat up to Valdivia. So I was to meet him next morning at the dining salon at 7 o'clock. [20]

Q. And what time did he tell you you would leave the ship?        A. 7:30.

Q. When the steamer was not docked at a pier but was anchored as the Hardinger was at Corral out in the harbor, did it take on and unload freight?

A. That's correct.

Q. When it was anchored in the harbor in that fashion, how did it load and unload freight?

A. It was the common practice that large barges



(Testimony of Harry L. Marshall.)

would come out from the mainland or the shore and tie up to the boat, and then they would come up into place when they were ready to load or unload into the hold. In the meantime, they would be back from the hold or out from the ship.

Q. In other words, barges would come up to the ship and the freight would be loaded and unloaded on and off of barges, is that correct?

A. That's correct.

Q. And that was the situation at Corral on the morning of February 1st?      A. That's correct.

Q. There were barges out alongside the ship, is that correct?

A. We were practically surrounded with barges on both sides of the ship.

Q. Now, you had breakfast with the Captain on the morning of February 1st? [21]      A. Yes.

Q. Pursuant to the arrangement?      A. Yes.

Q. At 7:00 o'clock?      A. Yes.

Q. Then what did you do after breakfast?

A. I went to my cabin just for a few minutes to get ready to go ashore, and I told the Captain I would meet him up on deck, which I did. I arrived up on deck about 7:30. He was talking to the First Officer at the gangplank. I said, "Good morning," to the First Officer, stepped between them, stood a minute on the top platform, and I thought the Captain was coming, which he was, and I started down the gangplank and the Captain was behind me.

Q. Now, Mr. Marshall, I will show you this sketch that has been marked Plaintiffs' Exhibit 1



(Testimony of Harry L. Marshall.)

for identification. I think I used it on my opening statement.

Mr. Erskine: I would like to have it deemed admitted for identification.

The Court: It may be admitted and marked.

(Sketch referred to marked Plaintiffs' Exhibit 1 for identification.)

Mr. Erskine: I think that Mr. Gerhardt and I stipulated that the Hardinger—I think it was 417 feet from bow to stern. [22]

Mr. Gerhardt: 441 feet 9 inches.

Mr. Erskine: From the bow to the stern. That is stipulated to, if the Court please.

The Court: It may be so stipulated.

Mr. Gerhardt: And 58 feet in breadth.

Mr. Erskine: And so that the court may know what we are talking about, I have a postcard showing the Hardinger. May I have that marked for identification?

Mr. Gerhardt: Go ahead.

The Court: It may be admitted and marked.

(Postcard marked Plaintiffs' Exhibit 3 for identification.)

Mr. Erskine: If the Court would like to see the picture of the ship——

(Handing document to the court.)

Mr. Erskine: And while I am about it, these were supplied me, these pictures, not by your office but by the people with whom I was in touch at the

(Testimony of Harry L. Marshall.)

beginning of this litigation. We might as well have those in to illustrate what actually took place, if you have no objection.

Mr. Gerhardt: These appear to be photographs taken at the dock, Mr. Erskine, rather than at anchor.

Mr. Erskine: Yes.

Mr. Gerhardt: The gangway is resting on the dock.

Mr. Erskine: Yes. Well, if you would rather not use them it is all right. It makes no difference. Do I take it [23] you would rather not have them used?

Mr. Gerhardt: I don't think we need them. I think your diagram will serve sufficiently for this case.

Q. (By Mr. Erskine): Now, Mr. Marshall, showing you the picture of the steamer——

The Court: This is a freighter, is it?

Mr. Erskine: It is a freighter carrying twelve passengers.

The Court: Proceed.

Q. (By Mr. Erskine): The gangway is shown in that picture, is it not, Mr. Marshall?

A. I would think that shows the gangplank there.

Q. That is the gangway in the middle, that dark streak along the middle of the ship?

A. Yes, I would think so.

Q. And that shows that the gangway, the head

(Testimony of Harry L. Marshall.)

of the gangway, was about in the middle of the ship, does it not? Is that right?      A. Yes.

Q. And so on the morning of February 1st at 7:30 you went out, as you have testified, to the head of the gangway, stepped out onto the upper platform of the gangway and went down the steps, is that correct?      A. That is correct.

Q. Now, did the Captain follow you down the steps?

A. Yes, he followed me down the steps. [24]

Q. Then what happened?

A. Then he turned around to speak to the First Officer. He went up and spoke to the First Officer and I waited until I saw him coming down again, and then I proceeded down the gangplank and he was behind me.

Q. To the lower platform of the gangway?

A. That is correct.

Q. And when you were at the lower platform of the gangway, about how far out from the ship was the barge shown in Plaintiff's Exhibit 1?

A. I would say it was about a foot and a half out from the ship.

Q. The barge was under the lower platform of the gangway, but about a foot and a half out from the side of the vessel?      A. That is right.

Q. At that time did you notice whether or not there was a swell in the sea?

A. Well, there was always a swell when you were lying out at anchor, and I noticed that there was a swell that day, yes.

(Testimony of Harry L. Marshall.)

Q. About how high was that swell from the crest of the wave down to the—not a breaking wave but the wave constituting the swell, from the crest down to its hollow?

A. Well, as I recall it, it was between two and three feet, I think. [25]

Q. Was the barge moving with that swell?

A. Yes.

Q. Was the barge loaded or unloaded?

A. It was unloaded. It was empty.

Q. When you were at the lower platform of the gangway that swell was in the sea and the barge was moving up and down with the swell?

A. Yes, sir.

Q. Now, about what distance from the deck of the barge was the lower platform of the gangway?

A. Would you say that again, please?

Q. About what distance, how much above the deck of the barge was the lower platform of the gangway?

A. When I was standing there?

Q. Yes.

A. I would say two or three feet.

Q. And there was this movement of the barge?

A. That's correct.

Q. Now, at that time. Mr. Marshall, did the Captain say anything to you?

A. He said nothing.

Q. And did the First Officer say anything to you?

A. He said nothing.

Q. Was any step taken to lower the gangway so that it was nearer the deck of the barge? [26]

A. None.

(Testimony of Harry L. Marshall.)

Q. Now, you stood there on the lower platform of the gangplank in the position you have described, and what did you do then?

A. Well, I looked at the barge, and sort of subconsciously I wondered if the Captain was going to say anything. Nothing was said, so I assumed I was to jump, and I jumped and he jumped after me.

Q. Now, when you jumped, in what direction did you jump? Parallel to the ship or at right angles to the ship?

A. I had to jump at right angles to the ship because there wasn't enough space to jump straight off the gangplank, because the barge was a foot and a half out.

Q. So you jumped at right angles to the ship?

A. I jumped at right angles to the ship.

Q. And about where on the deck of the barge did you land on that jump?

A. I landed, I would say, six or eight inches, maybe a foot, from the coaming rail of that first hold.

Q. Would you mind coming down here and marking—put an “A” on the deck of the barge at which you now recall you landed, the approximate location? Here is a pen.

(Witness went to blackboard.)

Mr. Erskine: Make it large enough for the Judge to see it. [27]

The Witness: Do you want an “X”?

(Testimony of Harry L. Marshall.)

Mr. Gerhardt: I would suggest for the record that you mark it "M-1."

Mr. Erskine: Yes, mark it "M-1."

The Witness: (Marking on diagram.)

(The witness resumed the witness stand.)

Q. (By Mr. Erskine): When you made that jump and lit on the deck, what happened then?

A. Well, the instant I hit the deck I was pitched forward head down into the empty hold.

Q. You were pitched to your left?

A. Pitched to my left.

Q. By the movement of the barge?

A. That is correct.

Q. And what did you do then?

A. Well, I knew if I went down the hold I couldn't survive it, and I couldn't move my feet because the thing happened so fast, so I twisted my whole body to the right and in that way tore the ligaments out of my left leg.

My right leg, you see, my weight wasn't on the right leg so that was saved, but the left leg took the brunt and I tore the ligaments out of that leg.

Q. Did you know at that time you had torn the ligaments?

A. Oh, no, but I knew I had hurt myself. Then I fell to the deck. [28]

Q. On your hands and knees?                      A. Yes.

Q. And then did you get up?

A. I got up immediately.



(Testimony of Harry L. Marshall.)

Q. At the time you made that twist of your body to the left did you feel any pain?

A. I felt a dull pain, and I rubbed my knee, but the acute pain came later when the blood got collected there.

Q. Now, when you got up, you got up instantly after you had fallen? A. Yes.

Q. At that time was the Captain of the ship on the barge?

A. As I recall, he was directly behind me.

Q. He jumped directly behind you?

A. Right behind me.

Q. By the way, the deck of the barge was of what material? A. It was heavy steel.

Q. Was it wet or dry?

A. I can't recall. It was an overcast day. I imagine there was a certain amount of sea moisture, but it wasn't wet like a rainy deck.

Q. Now, when you picked yourself up and started across, what did you do then after you picked yourself up?

A. I limped over to the little launch that was at the corner there of the barge. [29]

Q. Would you mind indicating on this sketch here where that little launch was? Mark it "M-2."

(Witness went to the blackboard and marked the diagram.)

Q. (By Mr. Erskine): That little launch was a shore boat, is that correct?

A. That is correct.

(Testimony of Harry L. Marshall.)

Q. And where was that shore boat when you were on the lower platform of the gangway or going down the gangway, do you recall?

A. It was either just ready to tie up there or it was tied up, but it was so close I can't remember whether it was tied up or just tying up.

Q. And you walked from where you had fallen over to the shore boat?      A. That is correct.

Q. You had a conversation with the Captain while you were on the deck of the barge immediately after you had fallen?

A. I don't recall whether I had the conversation on the deck or in the little shore boat. I can't recall which place I had it. I can't recall that.

Q. Well, regardless of where you had it, what was said?

A. The Captain said, "Have you hurt yourself badly?" And I said, "I don't know." He said, "Would you like to go back aboard the ship?" And I said, "No, there is no use going back aboard ship because there is no doctor there, and [30] no doctor in Corral, so I think we might as well go on to Valdivia," and he acquiesce, and so we did.

Q. As a matter of fact, there wasn't any doctor on the ship, was there?

A. No doctor on the ship, no doctor in Corral.

Q. After you had gotten into the small boat with the Captain, then what happened?

A. It was, as I recall, about a quarter of a mile in to shore to the dock where you got off and got on the ferry boat that went up the river. We went

(Testimony of Harry L. Marshall.)

from there—limpingly I got off the little boat and onto the bigger boat and we took off for Valdivia.

Q. Valdivia was about how far up the river?

A. Well, by the length of time—we made so many stops it seemed longer than it was, but I understand it is eight or nine miles up the river.

Q. Did the Captain help you from the shore boat to the dock at Corral, and from the dock onto the river boat, or did you make that yourself?

A. I made it myself.

Q. And you went up to Valdivia, did you?

A. We went up to Valdivia together.

Q. What happened to your knee, if anything, while you were going to Valdivia?

A. Well, it kept getting bigger and bigger and bigger, and [31] as I pulled my trousers up it was about the size of a large cauliflower. So when I got to Valdivia I couldn't walk and they helped me off the boat and got me in an automobile and took me to the hospital.

Q. Did you have any medical attention there?

A. Yes, I had two doctors there, one doctor whom the agent had brought, I believe, and then a surgeon who X-rayed me, fluoroscoped me, took the blood off my knee and put my leg in a cast.

Q. Then when you say he took the blood off your knee, what do you mean by that, Mr. Marshall?

A. He put a needle into my knee and drew off a great deal of blood.

Q. Is that what they call "aspirated"?

A. Yes, aspirated.

(Testimony of Harry L. Marshall.)

Q. Then after they put the cast on your knee, what happened then?

A. Then they had an ambulance, and they took me in the ambulance to the hotel with the Captain and the agent, and we had our lunch, and I was in the cast; and then they got an automobile and took me down to the dock and we got back into the river boat.

Q. You were helped back into the river boat?

A. Oh, yes, then I had to be helped a great deal, of course, because of the cast. [32]

Q. Then you went down the river again and got into the shore boat, did you?

A. That is correct.

Q. And you went back to the steamer in the shore boat?

A. That is correct. And the barge was no longer by the gangplank. The gangplank was right there and the officers and some of the crew helped me get aboard. I think they carried me aboard because I couldn't walk up the gangplank.

Q. And you were taken to your cabin?

A. That is correct.

Q. And went to bed then, did you? A. Yes.

Q. Now, I think I may have asked you this, but I am not sure; when you made that jump from the lower platform of the gangway to the deck of the barge, the Captain, you testified, was a few steps up the gangway behind you? A. Yes.

Q. Was there anybody from the ship down on

(Testimony of Harry L. Marshall.)

the barge to help you from the lower platform of the gangway to the deck of the barge?      A. No.

Q. When did the steamer leave Corral?

A. Two days after my accident. February 3rd, I believe.

Q. And what did the steamer do then? What course did it take? [33]

A. That was the last port of call on the west coast, so we went through the Straits of Magellan and came up the east side and stopped where they didn't expect to stop, and it wasn't listed, at Bahia Blanco, which was in Argentina, and we stayed there four days.

Q. During the time the steamer was going from Corral to Bahia Blanco were you able to go about the deck at all?

A. The Captain got out some crutches that they had in the storeroom, and with the help of the crutches and passengers, I could get out on deck and sit in a chair and watch the Straits of Magellan.

Q. Did you spend most of your time on deck or in bed?

A. At first I spent most of the time in bed, but after I got the crutches, I tried to go out and sit for an hour or so for air.

Q. Was your knee giving you any pain during that time?

A. It was giving me a great deal of pain. I had to take a great deal of codein which was given me by a trained nurse who was a passenger, and I took



(Testimony of Harry L. Marshall.)

penicillin shots every night to keep from having infection due to the cast.

Q. And that was going on during the time——

A. Went on all the way to Buenos Aires.

Q. Did a doctor come aboard at Bahia Blanco?

A. Unexpectedly a doctor came aboard because some of the passengers, when they went ashore, they got one to come aboard. [34] He came aboard and he said that the cast should come off because the knee was so swollen, so the First Officer and this trained nurse with a great deal of effort got the cast off. The doctor didn't take it off. He went back ashore. The First Officer and the nurse took the cast off.

Q. Then you went on to Buenos Aires?

A. That is correct.

Q. Well, according to this list that has been introduced in evidence you arrived in Buenos Aires, February 16th?

A. That is correct.

Q. What happened then, Mr. Marshall?

A. Well, the Wells Fargo Bank, when I left here they had given me a letter of introduction to the First National Bank of Boston, which has a very large office in Buenos Aires. When I was in Corral I wrote them a letter and asked them to get me the best orthopedic man possible, and make arrangements for him to see me, which they did do, and they gave me the name of the doctor, and the hospital, which was the British—I forget if it was Argentine-British or just the British Hospital. Anyway, I had all that before we left Bahia Blanco, the name of the doctor and the hospital and his residence, and as



(Testimony of Harry L. Marshall.)

soon as I got there the arrangements were made for me to go to the hospital.

Q. And you went to the hospital?

A. That is correct. [35]

Q. And you saw the doctor there?

A. Saw the orthopedic man.

Q. Did you consult with him with respect to your knee?

A. Yes, and he x-rayed me and fluoroscoped my knee, took the blood off again, and said I would have to have surgery, that I would have to be operated on, that the cast wouldn't do any good, that nothing would do any good but surgery. He wanted to operate right then and there.

Q. What did you do?

A. I said well, I would like to fly back to San Francisco and go to Dr. King, whom I knew and who is head orthopedic man at Stanford.

Q. And did you go back from Buenos Aires?

A. I flew back, yes.

Q. You left the ship at Buenos Aires?

A. Yes.

Q. And you flew back from Buenos Aires to San Francisco?

A. That is correct.

Q. About when did you arrive in San Francisco?

A. I believe the 1st of March. 2:00 o'clock in the morning, I remember.

Q. Now, before I go on with that, Mr. Marshall, I want to ask you these questions:

I think you have already testified that at these other ports of call that preceded the date upon

(Testimony of Harry L. Marshall.)

which you arrived [36] in Corral, Chile, you and the other passengers would go ashore, is that correct?

A. Yes, once or twice a day sometimes.

Q. You went ashore for what purpose?

A. Sightseeing.

Q. And did the ship make arrangements for you to go ashore? A. Always.

Q. That is, when the ship wasn't tied up to a pier but was anchored out in the harbor at one of these ports of call, the ship would make arrangements for a shore boat to come out to the vessel to take the passengers ashore, is that correct? A. Yes.

Q. And do you recall whether or not on any other occasion prior to this occasion at Corral you had gone ashore by getting on a barge and then from the barge getting onto a shore boat?

A. I can't recall that definitely because the barges were nearly always kept away from the gangplank.

Q. So your best recollection is that on all prior occasions you went ashore in a shore boat into which you got directly from the gangplank, is that correct?

A. Yes, I think that's right.

Q. Now, what was the practice on those prior occasions so far as the passengers were concerned in moving from the gangway onto the shore boat that took them ashore?

A. Well, the shore boat would come up, and either by one of [37] those poles and a hook, hooked onto the gangplank, and there would be a man who was running the shore boat would come aft, if we

(Testimony of Harry L. Marshall.)

were getting on the aft, and there would always be a seaman or a Second or Third Officer on the lower platform to help us on the boat, and the man on the boat would help us into the boat.

Q. And how near the top of the gunwale of the shore boat would the lower platform of the gangway be on those occasions?

A. Well, that would vary with the type of weather we were having, and that would be a little hard to say, but when we needed—I can remember sometimes it would be enough so that you needed a lot of help. The man in the little boat would grab the passenger and put them into the boat after the man on the gangplank would let you go out.

Q. Then there was a man from the ship on the platform of the gangway that would help the passengers go from the gangway to the shore boat and the man in the shore boat would help, is that right?

A. Yes.

Q. On those occasions, would you use whatever help was offered you?      A. Yes.

The Court: We will now take a recess.

(Short recess.)

Q. (By Mr. Erskine): Mr. Marshall, in looking over my notes [38] I find I may have overlooked one or two points. This sketch shows correctly the barge and the ship, and the relationship of the barge to the ship and the relationship of the barge to the gangplank, doesn't it?      A. Yes.

Q. In other words, there were three holds on the barge?      A. That is correct.

(Testimony of Harry L. Marshall.)

Q. And the lower platform of the gangplank was about opposite what has been marked on the sketch as the forward end of the barge?

A. That is correct.

Q. And that is in the position shown in the sketch?

A. I think that's right.

Q. Now, Mr. Marshall, just another couple of questions, a couple of other loose ends. How old are you now?

A. Sixty-three.

Q. And on February 1st, 1955, you were——

A. Sixty-one.

Q. Sixty-one. Was the Captain of this ship, the Hardinger, did he know how old you were on February 1st, 1955?

A. Yes, because he celebrated my birthday with me ashore.

Q. During the course of this voyage?

A. Yes.

Q. Before you arrived at Corral?

A. Oh, yes. Ten days before. [39]

Q. And now, I don't know whether you have testified to this or not, but when you got to Corral—I mean when you got to Bahia Blanco and the cast was removed, was your knee swollen?

A. Yes.

Q. Filled with blood again?

A. Yes.

Q. Was the blood taken off?

A. You see, the cast was taken off after the doctor had gone ashore. There wasn't anybody to take the blood off, so it wasn't taken off.

(Testimony of Harry L. Marshall.)

Q. But after Buenos Aires was your knee swollen again with blood?

A. It was the same swelling, only a little larger.

Q. I see. Was the blood taken off there?

A. Immediately.

Q. How long did you stay in Buenos Aires before you got a plane home?

A. Well, we got there the 16th and I stayed and I got here the 1st of March, so I was there fourteen days. The reason for that was that my airplane reservation—one reason for that was that my reservations were cancelled by the company for some bigger brass and I had to wait another seven or eight days to get another reservation.

Q. Was the blood taken off your knee more than once while you were in Buenos Aires? [40]

A. I believe twice.

Q. Aspirated in the way you have described?

A. Yes.

Q. I think you have testified that during the trip from Corral to Bahia Blanco were you or were you not suffering pain from your knee during that trip?

A. Well, when the blood would collect like that there was a throbbing pain and a nasty pain.

Q. That painful condition continued at Buenos Aires? A. Yes.

Q. And it continued until you got to San Francisco? A. That is correct.

Q. What did you do when you got to San Francisco?

A. Well, I telegraphed, I believe, from Buenos Aires for an appointment with Dr. King, so every-



(Testimony of Harry L. Marshall.)

thing was arranged on arrival. After staying a night at a hotel I went immediately to Stanford. That was the 1st of March, I believe.

Q. Were you admitted to the hospital at that time?

A. Yes. Dr. King examined me in his office, took the blood off again, had lots of X-rays and fluoroscopes, and ordered me a room and to get ready for surgery.

Q. And you were operated on on March 7th?

A. I can't remember that date. Was it the 7th?

Q. Well, it was a few days after you arrived in San Francisco? A. Yes. [41]

Q. And you arrived here on March 1st, is that correct? A. Yes.

Q. Now, after that operation, Mr. Marshall, was there any change in the condition of your knee so far as pain is concerned?

A. Well, it was a different kind of pain. As soon as the surgery and they sewed all the ligaments together, then there was no more collection of blood so I had no more of that type of swelling, but I had the pain from the surgery and the bandages and the dressings, and so forth.

Q. Now, how long after—strike that. When did you begin to take physiotherapy?

A. As soon as the doctor let me out of the hospital. About two weeks after surgery.

Q. About two weeks after surgery?

A. Yes.

Q. You began to take physiotherapy?



(Testimony of Harry L. Marshall.)

A. Yes.

Q. What did that consist of, Mr. Marshall?

A. Well, heat lamps to start with, and he asked me to have heat lamp treatments at home so I had to rent one and I took that morning and night, and gradually they put weights on my foot, strapped them on, and then I would work that up and down, and they increased the weights until I got to—I can't remember, but it was a goodly number of pounds before I [42] was discharged. I would have to lift it up like that (demonstrating).

Q. When were you discharged?

A. I think it is in the record there, but I think about the 27th of April, I believe. It is in the bills there.

Q. The 27th of April, 1955?                      A. Yes.

Q. And that is when you were discharged from physio-therapy treatments?                      A. Yes.

Q. After the operation did you have any post-operative pain?

A. None except what I just said, the pain from the surgery. But after the physiotherapy it was painful, of course, lifting weights, but when I wasn't lifting weights, I didn't have much pain, no.

Q. When did the doctor discharge you?

A. Oh, I went back, I believe, to see him, well, for a year. I mean two or three times, just to be checked up.

Q. Yes. Do you suffer any pain now of any consequence from this injury to your left knee?

A. No pain. It is a barometer for weather. I

(Testimony of Harry L. Marshall.)

can tell when it is going to rain, but I have no pain. It is sore to the touch.

Q. Can you use that knee as you did before?

A. Yes, I use my knee all right. [43]

Mr. Erskine: I think that is all. Oh, pardon me. I want to offer these special damages.

If the Court please, I have a list of the bills that Mr. Marshall paid because of this injury to his knee. I had the cancelled checks and the bills and everything listed here. I went over the list with Mr. Gerhardt this morning and he said, as I recall our conversation, that he would stipulate that the items stated in the list are correct.

Mr. Gerhardt: That is correct, your Honor. I have checked all the cancelled checks and the bills and the totals agree with the totals that are on this list, so rather than introduce all those checks and receipts, I think it would be quite satisfactory to admit the list into evidence.

Mr. Erskine: Then I offer the list in evidence.

The Court: Let it be admitted and marked.

(List referred to admitted into evidence as Plaintiff's Exhibit 4.)

Mr. Erskine: The list shows that Mr. Marshall paid \$543.68 to Stanford Hospital; \$25.00 to Doctor Clark; \$200.00 to Doctor King; \$98.00 to Nurse McKinney; \$28.00 to Nurse Fisher; to Stanford Hospital for the physiotherapy, \$165.75; for rent of the lamp \$30.00; transportation charges \$38.00; total of \$1,218.43.

(Testimony of Harry L. Marshall.)

Q. (By Mr. Erskine): I show you this list, Mr. Marshall, and that list, Plaintiff's Exhibit 4, is a correct statement of [44] the amount expended by you for doctors, nurses, hospital, physiotherapy because of this injury to your knee?

A. Yes, with the exception that I never listed my South American expenses because I paid by Travelers Checks and I have no record of it.

Q. The expenses you paid down in Valdivia, Bahia Blanco, and Buenos Aires, doctor and medical expenses you paid down there, are not included here?

A. No.

Q. You paid those by Travelers Checks?

A. Yes.

Q. You didn't have bills?

A. Well, I didn't keep them anyway.

Q. Can you estimate about how much those expenses came to?

A. Well, you know, the rate of exchange was in our favor, I believe, and I wouldn't say I spent altogether in Valdivia, Bahia Blanco and Buenos Aires—and I went every day for treatment by taxi—I don't think the whole thing would total more than \$100 or \$125.

Q. I believe you said this trip was taken as a pleasure trip for a vacation?

A. That is correct.

Mr. Erskine: That is all.

(Testimony of Harry L. Marshall.)

Cross-Examination

By Mr. Gerhardt:

Q. Mr. Marshall, I show you Westfall-Larson Company contract passengers ticket No. 0045 providing for the first part of your passage from Los Angeles to Buenos Aires aboard the Hardinger, which contains on the reverse side a signature "Harry L. Marshall, Jr." I will ask you if that is your signature?

A. Yes, that is my signature.

Q. And is that the contract passengers ticket that was issued to you before you boarded the vessel?

A. Yes, I would think so.

Mr. Gerhardt: I will ask that that be admitted as Respondent's first in order.

The Court: It may be admitted and marked.

(Passengers ticket admitted into evidence as Respondent's Exhibit A.)

Q. (By Mr. Gerhardt): Mr. Marshall you arranged for your ticket aboard the vessel in San Francisco, is that correct?

A. That is correct, sir.

Q. And you paid, I think, according to the ticket, \$750.00 for the first leg of your passage, together with an additional baggage charge of \$5.00, or \$755.00, is that correct?

A. Well, it is my recollection I paid for a round trip.

(Testimony of Harry L. Marshall.)

Q. Yes. I am just talking about the first half of the voyage. The round trip would be double that or approximately \$1,460.00?

A. Yes, but I paid that here before we left. [46]

Q. Yes. And about how long before you left did you pick up your ticket?

A. Well, I can't recall that, but I would say a week or two weeks before. I don't know.

Q. Then as I understand it, you boarded the vessel in Los Angeles and you completed the voyage at least as far as Buenos Aires, the first half?

A. That is correct.

Q. Was the passage money for the second half of your trip refunded to you?

A. Not at the time, but later on.

Q. Later on?

A. It had to go through the office machinery. I got it maybe six weeks later.

Q. And that was refunded in an amount of approximately \$750.00 or \$755.00, is that correct?

A. That is correct.

Q. Now, in connection with your going ashore when the vessel was at anchor in other ports, about how many times had you done that before this trip ashore at Corral, Chile?

A. Well, you mean in those little boats?

Q. In the small boats, yes.

A. Well, whenever we didn't dock, and I would say—may I look at that list?

Q. You certainly may. [47]

A. Oh, I have a copy of it here. You see, there



(Testimony of Harry L. Marshall.)

were so very few places we could go up to dock. In Buena Ventura we did both. At low tide they would have to cast the ropes off and go back into the main stream. So that would be one on the little boats. Well, I would say maybe seven out of nine that we were out in midstream.

Q. Were those occasions when quite a few passengers went ashore—more than one?

A. Oh, we nearly always went together. There were anywhere from six to eight. Some parties of two might stay aboard.

Q. But normally some six or eight passengers went ashore on those occasions?

A. I would think so.

Q. Did that include women passengers?

A. Yes.

Q. And these small boats were shore tugs that came out and picked you up from the foot of the gangway? About what size were those as compared with the barge you boarded at Corral, Chile, to go ashore?

A. Well, they varied in every port, but this one, as I recall, was a rather small one. Now, that barge was a hundred feet long, I believe, and I would think that this little tug would be about twenty, twenty-five feet.

Q. Was that about the average size, twenty or twenty-five feet, thirty feet? [48]

A. I would say they varied. Some of them were quite big and some were twenty, twenty-five feet. I think this was as small as any.



(Testimony of Harry L. Marshall.)

Q. Well, would you say that any of them exceeded fifty feet?      A. No, none that I recall.

Q. They wouldn't exceed fifty feet?

A. No, I don't think so.

Q. And those smaller tugs or shore boats that came out to pick you up, did they have considerably more movement in the water then, for instance, this large barge had alongside the vessel?

A. Well, I think definitely. The law of gravity, I would say yes.

Q. And compared to the movement of the smaller boat that you had previously boarded from the platform at the bottom of the gangway, the barge on this occasion was a much more stable structure so far as movement was concerned?

A. It depended a good deal on the weather and the size of the tug.

Q. Taking the smaller tug and waves or swells, rather, from two or three feet high, there was considerably more movement of the tug under those circumstances than there was of the barge, isn't that right?

A. Oh, yes, that would be true. Just like if the barge was [49] loaded, there would be less movement than if it was empty.

Q. On this particular occasion, your testimony this morning was that there was some moisture but that the deck was not wet. What do you mean by that, Mr. Marshall?

A. I say it was not wet from rain. I said it was an overcast day and early in the morning there

(Testimony of Harry L. Marshall.)

must have been some night sea moisture on deck. It would look wet but it wouldn't have any retention of water like rain on it.

Q. Are you guessing at that or do you recall?

A. Well, I am not guessing. I know it's true.

Q. When your deposition was taken, Mr. Marshall, you remember being present in my office at the time your testimony was taken on June 29, 1956?

A. Yes.

Q. On page 19 where I was inquiring of you concerning the condition of the deck of the barge, I asked you if it was a steel deck and you said that it was. One of my questions was, "Was it dry?" Your answer was, "It was. I would say dry, yes. It hadn't been raining. It was dry."

A. That is what I had in mind. It wasn't a rainy day. Just the sea moisture which certainly had no thickness to it.

Mr. Erskine: No what?

A. It had no depth like raindrops. It was just the moisture you get at sea.

Q. (By Mr. Gerhardt): Did you slip on that deck? [50]

A. I did not slip.

Q. Now, when you came down the gangway that morning to board the barge, did you expect there would be somebody there to help you off the gangway?

A. Well, I came down the gangplank with the Captain, and I assumed that what we did would be with the approval of the Captain. If there wasn't

(Testimony of Harry L. Marshall.)

anybody on the barge, I assumed he didn't want anybody on the barge.

Q. This was a little different situation than had existed before, I mean in the sense that just you were the only passenger going ashore with the Captain, is that right?

A. Well, yes, but there had been times when just one passenger went.

Q. That is contrary to your testimony awhile ago. I understood you to say that at least six or eight passengers would go.

A. I said that was usual, but I can remember when one or two people went.

Q. This was different, though, in the sense that there was this large one hundred foot barge located at the foot of the gangway, is that correct?

A. That is correct.

Q. And as I recall, at the time your deposition was taken, on page 22 you stated that you did not think there would be anybody down on the barge to assist you, isn't that right? [51]

Mr. Erskine: Wait a second. What page is that? I think you should show him the testimony.

Mr. Gerhardt: I will read it to him.

Mr. Erskine: And let him take a look at it.

Mr. Gerhardt: All right. On page 21, line 25, Mr. Marshall, I asked you, "Now, did you expect there would be somebody at the end of the lower platform to assist you onto the barge?" And your answer was, "That had always been customarily so. I mean on and off the ship there was always some-

(Testimony of Harry L. Marshall.)

body to help you when we went ashore, but I thought because of the earliness of the morning that one would have to accept the prevailing situation. There wasn't anybody there, and I thought because it was half past seven in the morning that they had failed to put somebody there."

Is that right? Was that your answer?

A. Right.

Q. How far away was the Captain from you when you jumped?

A. I would say two to three steps up the gangplank.

Q. Two to three steps? Did you inquire of him or make any statement to him how you were expected to get off onto the barge?

A. No. I tarried a few seconds on the lower platform. The Captain was two or three steps behind me and no orders were given.

Q. You say there was nobody on the barge? [52]

A. I saw nobody on the barge.

Q. There was no obstruction? You could see the complete deck of the barge, couldn't you, Mr. Marshall?

A. I certainly could.

Q. And as you were coming down the gangway you were naturally facing in a direction which would take in practically the entire length of the barge on the side nearest to the vessel, is that correct?

A. Not necessarily. I think when you are going down a gangplank you look at your feet, and when

(Testimony of Harry L. Marshall.)

you get to the platform, if you are going to jump at right angles, you look at right angles.

Q. Had there been somebody working in there in this area within twelve to fifteen feet of the bottom of the platform, do you think you would have seen them?

A. If I were looking that way I would certainly have seen them, yes.

Q. As you walk down a gangplank do you watch your feet every second? A. I certainly do.

Q. And when you got to the bottom of the platform didn't you look at the entire barge to see what its movement was?

A. No, I was looking at the holds and I was looking back to see if the Captain was coming, and I decided the only way I could get on the barge would be to jump at right angles [53] because if I jumped ahead of me the passage was too narrow.

Q. And you saw no one there?

A. I saw no one there.

Q. Did you have any conversation with anyone on the barge?

A. I had no conversation with anybody on the barge because I saw no one.

Q. Did anybody on the barge speak to you?

A. No one that I heard.

Q. Did anyone on the barge give you a warning not to jump?

A. If they had, I wouldn't have jumped. I would have asked the Captain.



(Testimony of Harry L. Marshall.)

Q. Had that warning been given, you would have waited?

A. I would have asked the Captain then.

Q. Without that warning, was there any reason for you to go ahead and jump without asking the Captain?

A. Oh, I don't think a passenger need ask a Captain or order a Captain. I think when he was two steps behind me if he didn't want me to jump he would have said so, or he would have said, "Let me go ahead."

Q. Now, could you have jumped from the corner of the lower platform of the gangway along this edge of the barge, that is the inboard edge?

A. No. No, because it was too dangerous, because the barge was out about a foot and a half and if I had jumped there the passageway was too narrow. [54]

Q. Could you have jumped towards forward hold?

A. No, not knowingly, no.

Q. Mr. Marshall, do you know how you were pitched when you hit? What was it that pitched you?

A. I think the swell of the sea. I think the barge must have been coming up.

Q. The barge was coming up?

A. I say I think it was coming up.

Q. Then as I recall your deposition testimony, you said there was no movement of the barge away from or toward the vessel, that is, a sideways motion?



(Testimony of Harry L. Marshall.)

A. All I recall is that the barge was up and down, a swell movement.

Q. Yes. And there was no fore and aft movement, that is, toward the bow of the vessel or towards the stern of the vessel?

A. Not that I could testify to.

Q. Your recollection is that the barge was moving in an up and down manner? A. Yes.

Q. Can you recall when you jumped whether the barge was on the way up on the swell or whether it was on the way down?

A. Well, that would be hard to recall exactly, but I think it was up—coming up.

Q. Coming up? And do you recall whether it had reached the [55] peak of the swell?

A. No.

Q. It had not?

A. I do not recall that.

Q. What made you decide that that was the proper moment to jump?

A. Well, I had stood there a few seconds and it seemed to me it was a safe distance. What I didn't understand or know is what a swell could do to you.

Q. And in this particular instance——

A. (Interposing): If there had been no swell, it would have been a safe jump.

Q. That is true, but you could see the swell, couldn't you? A. Right.

Q. Now, when you jumped at right angles from the lower platform, you jumped so that you would

(Testimony of Harry L. Marshall.)

land on your feet in this area between the forward end of the barge and the forward hold?

A. Which was a ten foot space, I believe.

Q. Now, did you land with your feet on the deck of the barge facing across the barge?

A. Approximately. I was right angles to the ship, but perhaps a little to the left. What that was due to, I don't know. Then as soon as I hit the barge, I was pitched headlong down into the hold.

Q. You didn't actually go into the hold? You stopped yourself before you went into the hold?

A. I wouldn't be here if I hadn't.

Q. What I am trying to get at, Mr. Marshall, is that when you jumped off the gangway platform, was there anything while you were going through the air that made you land at an angle so that you were facing toward the hold?

A. If there was, I can't account for it, outside of the swells.

Q. But you hadn't contacted the barge at that time when you were on your way through the air, had you?

A. But I didn't really get turned till I hit the barge, and then I got the impact of the barge when it was coming up and that turned me. Whether the barge at the same time was going backward or forward, I don't know. That is what happened, though.

Q. Did your feet land solidly on the deck?

A. Landed solidly. So solidly that I couldn't move them when I got pitched. It all happened so fast, I couldn't move, I just had to twist.

(Testimony of Harry L. Marshall.)

Q. Was this pitch of your body sideways or was it in the direction you had been jumping?

A. It was sideways about, I would say, four-fifths, and a little forward into it, too. The whole thing was like that (demonstrating). [57]

Q. So that when you landed, then, as I understand it, and assuming this area inside the jury box is the hold and this railing is the coaming, when you landed then you landed so that you were at an angle somewhat facing toward the hold?

A. That's correct.

Q. Even though when you jumped from the platform you had jumped so that you would land facing across the barge?

A. That's my recollection, yes.

Q. And you don't know of anything that made you twist in midair?

A. Unless the barge moved forward or backward, but I cannot account for it because I did not see it.

Q. Well, if the barge moved forward or backward, that still wouldn't affect your body as it was traveling through the air, before you landed?

A. My body wasn't affected until I hit the deck.

Q. Did you land on both feet at the same time?

A. Landed on both feet at the same time, but more weight seemed to be on the left foot and that is why I couldn't lift it or move it.

Q. Did you actually strike the edge of the coaming with your leg or your feet? A. No.

Q. Or with any part of your body?

(Testimony of Harry L. Marshall.)

A. No part of my body struck the coaming. [58]

Q. As you landed in this position, you turned in which direction—to your right? A. Right.

Q. Which would be toward the forward end of the hold—forward end of the barge?

A. That's correct.

Q. Did you twist your right knee at that time?

A. No, my weight was on my left when I hit the deck and I twisted my left knee by turning it. My right knee had no ill effects whatsoever.

Q. Now, Mr. Marshall, will you tell me about the conversation you had with the Captain after you returned to the vessel in which the matter of fault was discussed?

A. Well, you have that all in my deposition. When we came back to the ship and I was in bed in my cabin, the Captain came by to see me, as he did often after that, and I felt he was worrying a great deal about it, and I didn't know how badly hurt I was, and we had about ten days to go through the Straits, and I said, "Don't worry. Don't give it a thought. I feel it was my fault."

Q. And did you make that statement to him more than once?

A. I don't think so, but if I did I will certainly stand behind it.

Q. Did you make the same statement to the Chief Officer? A. Yes, I did. [59]

Q. And along about the same lines as this conversation with the Captain?

(Testimony of Harry L. Marshall.)

A. Yes, I said I didn't want him to worry, that I thought it was my fault.

Q. Did you at the same time make any reference to the fact that you weren't quite as young as you thought you were, or any other comment about the circumstances?

A. Oh, yes, I could have very likely said that, and I am willing to say that I did say it.

Q. Mr. Marshall, about when did you have any conversation with the Captain? How long after the accident?

A. Oh, I think, as I recall, it was the night I came back from Valdivia and I was in the cast in my cabin.

Q. When was it that you made a similar statement to the Chief Officer?

A. I don't know for sure, but I would think either that night or the next morning.

Q. Now, Mr. Marshall, we have taken some depositions in this case and one of them was by a seaman who testified. His name was Norffin and he testified in his deposition about the circumstances existing on that day. Did you read his deposition?

A. Yes, I did.

Q. And in that deposition he stated that you were given a warning not to jump. Do you disagree with that statement? [60]

Mr. Erskine: Now, just a second, if the Court please. I object to the form of the question. It is argumentative. He can't quote the testimony of another witness and ask this witness if he agrees with



(Testimony of Harry L. Marshall.)

it or not. He has stated very clearly and unequivocally that he didn't see anybody on the barge, didn't hear anybody say anything to him from the barge.

The Court: Reframe your question. The objection will be sustained.

Mr. Gerhardt: Did you read the testimony of Mr. Kaldefoss?      A. Yes, I did.

Q. And you examined the diagram that he made of the vessel and the barge alongside, is that right?

A. Yes, I did.

Q. And as I recall it, you felt that his diagram was correct except that he placed the barge a little further forward under the gangway?

Mr. Erskine: Just a second. I object to that question, if the Court please. If he wants to impeach the witness in some way, let him read the testimony. Don't ask him what he thought about the testimony of another witness.

Q. (By Mr. Gerhardt): Mr. Marshall, let me call your attention to page 11 of your deposition, line 9:

"Mr. Marshall, I show you Defendant's Exhibit A for identification, which is attached as an exhibit to the deposition of Alfred Kaldefoss, whom [61] you may remember was a Chief Officer on that vessel.      A. Right.

"Q. Have you seen that diagram before?

"A. Mr. Erskine showed it to me just a short time ago this morning.

"Q. I see. Now, does that represent the situa-



(Testimony of Harry L. Marshall.)

tion that existed at the time you went down the gangway?

“A. It does partially. As I say, facing the bow the gangplank was on the left, and it was coming down toward the stern.

“Q. Yes.

“A. But this barge at the time was——

“Q. You are referring to the barge in the diagram?

“A. Yes. It was nowhere this close to the ship.

“Q. How far away would you say it was?

“A. Well, I would say that it was about a foot and a half this way (indicating) from the ship.

“Q. The barge, the side of the barge nearest the vessel was a foot and a half away from the side of the Hardinger?      A. That's right.

“Q. Now, go ahead, please.

“A. And as I remember, the barge was not under the gangplank to that extent. It was more toward [62] the stern of the ship so that this deck was out a foot and a half from the Hardinger and this passageway here (indicating) was about even with the platform of the gangplank.”

Mr. Erskine: That is corrected, Mr. Gerhardt, to say that it was opposite the platform of the gangplank.

Mr. Gerhardt: Oh, I am sorry; my deposition doesn't so indicate.

Mr. Erskine: I should have called that to your attention. It is “opposite the platform of the gangway.”

(Testimony of Harry L. Marshall.)

Q. (By Mr. Gerhardt): That was your testimony in answer to those questions at that time, is that right, Mr. Marshall? A. Yes.

Q. That distance between the side of the barge and the side of the vessel you have estimated at about a foot and a half. Could that have been a little bit more or a little bit less?

A. Well, you know it is rather hard to be accurate. Even the captain and the first officer weren't accurate in their depositions.

Q. You were all quite close, between a foot and a foot and a half, is that correct?

A. Yes, I believe so. I gave you my best recollection.

Mr. Gerhardt: That is all.

(Witness excused.) [63]

The Court: Take an adjournment until 2:00 o'clock.

(Thereupon this cause was adjourned until the hour of 2:00 o'clock p.m.) [63-A]

February 18, 1957—2:00 P.M.

Mr. Erskine: If the Court please, I have no further examination of Mr. Marshall. We have Dr. King who took care of Mr. Marshall. Dr. King had operations scheduled for the afternoon and he said he couldn't interrupt his schedule and asked me to do what I could to avoid that occurring. I asked Mr. Gerhardt about it, and Mr. Gerhardt said he

had no objection to going ahead with his case, and we can call the doctor tomorrow morning, if that is satisfactory with the Court.

The Court: Very well. [64]

Mr. Gerhardt: If your Honor please, opening respondent's case I should like to call Mr. Nelson. Mr. Nelson speaks only fair English, your Honor, and I think he could get along without an interpreter, but for any words we might have difficulty with I have asked Mr. Berge, of San Francisco, to attend.

JAN ARTHUR NELSON

was called as a witness on behalf of the respondent, and after being first duly sworn, testified as follows:

The Court: Your full name, please?

A. Jan Arthur Nelson.

Q. What is your business or occupation?

A. I work on shore.

The Interpreter: He says he works——

The Court: Oh, we will get along all right.

Q. Where do you work?

A. I don't know what you call it in English.

Mr. Erskine: Can you speak a little louder, please, Mr. Nelson?

Mr. Gerhardt: Speak a little louder, please.

The Witness: Well, I work in the house where we got some sacks and things.

The Court: Where were you born?

A. In Bergen.

Q. Bergen what? A. In Norway. [65]

Mr. Erskine: Will you read that last answer?

(Testimony of Jan Arthur Nelson.)

(Answer read by the reporter.)

The Court: Maybe we had better use the interpreter. It might be better.

The Interpreter: He is at the present time working in a warehouse in Bergen, Norway.

### Direct Examination

By Mr. Gerhardt:

Q. What is your age, Mr. Nelson?

A. Twenty-four.

Q. Were you employed on the vessel named the Hardanger on February 1, 1955? A. Yes.

Q. What was your position or capacity as a seaman aboard at that time?

A. Ordinary seaman.

Q. Ordinary seaman? And did you witness an accident to a passenger, Mr. Marshall, who is here in court, who was leaving the vessel while it was at Corral, Chile, in February, 1955? A. Yes.

Q. Now, Mr. Nelson, let me show you an exhibit. Can you see all right from where you are?

A. Yes.

Q. This is an exhibit, Plaintiff's Exhibit 1, which has been filed and which is an air view, or bird's-eye view looking down on the deck of the Hardanger. [66] A. Yes.

Q. And which shows a barge located alongside the after end of the Hardanger, and at the forward end of the barge shows a gangway which leads

(Testimony of Jan Arthur Nelson.)

from the main deck of the Hardanger down to a position over the deck of the barge.

Now, at the time of the accident where were you?

A. I was standing down there and painting.

Q. Will you come down here and——

Mr. Erskine: I didn't get that answer.

The Interpreter: "I was standing down there and painting."

Q. (By Mr. Gerhardt): With reference to the gangway and the barge, where were you standing?

A. I was standing here, painting (indicating).

The Court: The reporter can't hear you.

Q. (By Mr. Gerhardt): The reporter can't get that, Mr. Nelson, but——

(Addressing the Court): The man placed his finger between the after end and——

Mr. Erskine: No, no, no. I didn't understand him to place his finger there at all. He showed it alongside there.

Mr. Gerhardt: That is what I am getting to. He started off at the after end of the forward hold. He didn't touch that. He moved his finger——

Mr. Erskine: I think, if the Court please, that the witness should be permitted to point out where he was, without [67] further statement from counsel.

Mr. Gerhardt: All right, I won't make any further statement.

Q. Let me let you use a pen and mark there your initials, "J.N.," where you were when Mr. Marshall came down the gangway. Just mark on the



(Testimony of Jan Arthur Nelson.)

diagram where you were when he came down the gangway.

A. (Witness marks on Plaintiff's Exhibit No. 1.)

Q. Now you may resume the witness chair, Mr. Nelson.

A. (Witness resumes witness chair.)

Q. What were you doing, what kind of work were you performing at the time?

A. I was scraping and painting.

Q. Scraping and painting what?

A. The ship.

Q. The side of the Hardanger?

A. The side of the Hardanger.

Q. Was there anybody else on the barge with you?      A. Yes.

Q. Who was that?

A. Well, I can't remember the name. It was Norfolk, or Norhouse.

Q. Another seaman?      A. Another yeoman.

Q. What is a yeoman? [68]

A. The first thing is a deck man, and then yeoman, and ordinary sailor.

Q. As I understand it, a seaman who first takes a position on the vessel is called a deck boy?

A. Yes.

Q. Then he is advanced to yeoman, then ordinary seaman?      A. Yes.

Q. And this other man that was on the barge with you was a yeoman?      A. Yes.



(Testimony of Jan Arthur Nelson.)

Q. Now, what was the condition of the sea at this time?

Mr. Gerhardt: Would you repeat that, Mr. Berge?

(Question reiterated by the interpreter.)

A. (Through the interpreter): There was a little swell, as we call it—a little slight movement of the sea.

Q. (By Mr. Gerhardt): Now, Mr. Nelson, will you tell us what you saw and what you did at the time Mr. Marshall came down the gangway?

A. Well, when I saw Mr. Marshall come down the gangway I tell him not to jump. I call up, "Don't jump."

Q. Where was he when you said that to him?

A. He was down on the platform.

Q. On the lower platform of the gangway?

A. Yes.

Q. Go ahead. [69]

A. And he didn't answer me, and just jumped, and when he landed on the deck he was falling, but I couldn't see how he came down on the deck. I just saw he was falling over. And after that was somebody coming down and helped him up, but who it was I cannot really remember.

Mr. Erskine: Just a second.

I would like to have you read that answer, please.

(Answer read by the reporter.)

Q. (By Mr. Gerhardt): Why did you tell him not to jump?

(Testimony of Jan Arthur Nelson.)

Mr. Erskine: Just a second.

That calls for a conclusion of the witness. I don't think it is his state of mind that is important; it is what he said and what he did.

The Court: Objection will be sustained.

Q. (By Mr. Gerhardt): Did you notice whether Mr. Marshall was looking in your direction when you warned him?

A. Well, he must see us. We stand right on the same way.

Mr. Erskine: I will ask that that answer go out as being unresponsive, and a statement of the conclusion of the witness, if your Honor please.

The Court: You may read the question and answer, please, Mr. Reporter.

(Record read by the reporter.)

The Court: Objection overruled. Question and answer may stand. [70]

Q. (By Mr. Gerhardt): Now, Mr. Nelson, how was the barge fastened to the side of the Hardanger?

A. With a rope aft and forward.

Q. A rope, or line, aft?

A. Aft, and one forward.

Q. Leading from where? From the barge to the Hardanger?

A. From the barge to the Hardanger.

Mr. Gerhardt: That is all.

You may cross-examine.

(Testimony of Jan Arthur Nelson.)

Cross-Examination

By Mr. Erskine:

Q. Mr. Nelson, when did you leave the Hardanger?

A. When did I leave? You mean paid off?

Mr. Erskine: Will you translate that to him, please?

(Question reiterated by the interpreter.)

A. September, 1956.

Q. (By Mr. Erskine): And what have you been doing since you left the Hardanger?

A. Since I left the Hardanger I go back home to Norway, and stay home for a few months, and after that I went on board another ship with the name Astria.

Q. And after that, what?

The Court: He boarded another ship.

Q. (By Mr. Erskine): And you said you were working at the present time in a warehouse? [71]

A. Yes. And after was staying on the Astria eight months. I paid off and stay ashore.

Q. You are working ashore now? A. Yes.

Q. In a warehouse? A. Yes.

Q. In Bergen? A. In Bergen, yes.

Q. What sort of a warehouse is that?

A. Well, an ordinary one.

Q. An ordinary warehouse? A. Yes.

Q. Are you dealing with any people speaking English while you are working in that warehouse?

A. No; just Norwegian.

(Testimony of Jan Arthur Nelson.)

Q. Now, Mr. Nelson, did you ever study English in school?      A. No.

Q. Did you ever live in an English-speaking country?

A. I have been in London six weeks.

Q. When was that?

A. It was in '51—1951 and 1952.

Q. Have you ever used English—prior to February 1, 1955, did you ever use English in connection with your business or socially with your friends and family when you were talking with them? [72]

A. Well, I talk English—well. I lived in the Norwegian Seamen's Center in London. When you went out in town you had to speak English to be understood.

Q. That was in London?

A. That was in London, yes.

Q. I think you said, Mr. Nelson, that the barge was tied to the ship with two lines.      A. Yes.

Q. One that is marked on the sketch here as "Forward"?      A. Yes.

Q. And one from the after end?      A. Yes.

Q. Would you mind coming down here and showing us where, on the aft end of the barge, the rope was tied that made the barge fast to the ship?

A. (Stepping to diagram): Well, as I remember, there was one rope here, and up here (indicating).

Q. Would it be correct for me to say that the rope on the aft part was—the rope was on the

(Testimony of Jan Arthur Nelson.)

barge at the point I am now marking "X"—and I am putting your initials opposite the "X"?

Mr. Gerhardt: Would you mind using a "1" after that, because I already have something marked "J.N."

Mr. Erskine: "J.N.-1."

Q. Is that about where the rope was tied fast to the barge? [73]

A. I don't really remember, but there was a rope on each side, but it is usually in the middle of the barge.

Q. It is usually in the middle of the barge?

A. Yes.

Q. About where I put the "X"? A. Yes.

Q. And that rope ran to what place on the ship, about? A. Oh, here (indicating).

Q. Would you mind if I marked it with an "X" up here, and marked it "J.N.-2"? That would be about the place where the rope was made fast to the ship? A. Yes.

Q. You can sit down again, Mr. Nelson.

(Witness resumes witness chair.)

Q. Now, when did you first see Mr. Marshall? Did you see him for the first time at the top of the gangway or on the lower platform of the gangway?

A. I saw him when he went down the gangway.

Q. You saw him coming down the gangway?

A. Yes.

Q. It is a fact, is it not, Mr. Nelson, that you saw



(Testimony of Jan Arthur Nelson.)

the captain and the first officer standing at the head of the gangway?

A. I didn't saw the captain. I was just looking at Mr. Marshall. [74]

Q. Did you see the captain coming down the stairs of the gangway, or on the gangway, at the time you spoke to Mr. Marshall?

A. I just see Mr. Marshall down there.

Q. Now, in your testimony you said that there was another man involved, but said you didn't remember who it was. Is that a correct statement of your testimony?

A. No, I didn't say that. I said there was somebody was helping him up again, but I can't remember who it was.

Q. You didn't recognize the captain?

A. No, I didn't.

Q. Would you say it wasn't the captain?

A. I can't say anything, because I didn't see anything but Mr. Marshall when he started to jump there.

Q. I want to find out this, Mr. Nelson: Would you say that the man who was helping Mr. Marshall up was not the captain?

A. I can't remember who it was.

Q. You can't recall who it was? That's your answer? A. That is my answer, yes.

Q. But you do recall that Mr. Marshall hit the deck and then fell over, is that right?

A. Fell over, yes. When he was falling, was



(Testimony of Jan Arthur Nelson.)

somebody else coming up and helping him, but I can't remember who it was.

Q. But you do recall when Mr. Marshall hit the deck of the barge on his jump he did fall over, didn't he? [75] A. Yes.

Q. You saw him fall?

A. I saw him fall, landing on the deck; I can't remember.

Mr. Erskine: Will you read that answer, Mr. Reporter, please?

(Answer read by the reporter.)

Q. (By Mr. Erskine): And did he pick himself up immediately after he fell?

A. Somebody was helping him.

Q. Somebody was helping him?

A. But who it was I can't remember.

Q. Now, you saw the individual helping him, didn't you? A. Pardon me?

Q. You saw the person who was helping Mr. Marshall rise to his feet?

A. I saw there was somebody, but who it was I can't remember. Sorry.

Q. You knew the captain of the ship quite well?

A. I knew him fairly well.

Q. Fairly well. But you didn't recognize that the captain was the man who was lifting Mr. Marshall to his feet?

A. There was some other ones there, too, but who it was——

Q. You don't know who it was? A. No.

(Testimony of Jan Arthur Nelson.)

Q. Now, did you see that other man jump from the lower [76] platform of the gangway onto the barge?      A. No.

Q. You didn't see that?

A. I didn't see that because, you see, when Mr. Marshall fell I was running forward to help him, but before I came to Mr. Marshall there was somebody else who helped him up. Maybe some of the crew of the barge, or someone else: I can't remember who it was.

Q. You think it was some member of the crew of the barge helped Mr. Marshall up?

A. I think so.

Q. Is that right?

A. I think so. I can't remember.

Q. Do you know, Mr. Nelson, whether or not there was anybody on the barge prior to the time that Mr. Marshall jumped—just prior to the time that Mr. Marshall jumped, beside you and Nordfonn?      A. What is that?

Mr. Erskine (To Interpreter): Will you ask the question, please?

(Question reiterated by the interpreter.)

A. Well, those people who was on the barge was those people who was working on there, and the tug—you know, the tug that we was going ashore with was laying out there.

Mr. Erskine: I didn't quite get that answer. [77]

(Answer read by the reporter.)

(Testimony of Jan Arthur Nelson.)

Q. (By Mr. Erskine): Is it your testimony, Mr. Nelson, that—I will reframe that question.

Is it your testimony that at the time Mr. Marshall jumped there were other men on the barge besides you and Nordfonn?

A. Not besides. He was working along there.

Mr. Erskine: I didn't get the answer.

(Answer read by the reporter.)

Mr. Erskine: I didn't get an answer to my question.

I think I will ask you to translate this question, and I would like the reply translated so I will understand it. The question will be this:

Is it your testimony, Mr. Nelson, that at the time Mr. Marshall jumped there were other men on the barge besides you and Nordfonn?

A. (Through the Interpreter): At the time of the accident there was no one working or just at the ramp there besides me and Nordfonn, but there must be some people working at the barge, and I can't say whether they were the people that came and helped Mr. Marshall up or if that was some people coming down the gangway. I can't recollect that.

Mr. Erskine: I would like to get an answer, a clear answer, to this question. You put it to him, if you please:

Q. Is it your testimony that when Mr. Marshall jumped there were other men on the barge besides you and Nordfonn? [78]

(Testimony of Jan Arthur Nelson.)

Mr. Gerhardt: I submit that has been asked and answered.

Mr. Erskine: I haven't got a clear answer to it. Translate that to him, please.

(Question reiterated by the interpreter.)

The Interpreter: He says that when the accident happened some people were coming there and helping, but he is not able to recollect if those people came from the barge, itself, or if they came from the ship. He says in the little excitement there, he says it is very difficult for him to remember where those people came from, but some people came and helped Mr. Marshall up.

Mr. Erskine: But he does not know whether those people came from the ship or came from the barge, is that right?

(Colloquy between the interpreter and the witness in the Norwegian language.)

The Interpreter: He says he cannot remember.

Q. (By Mr. Erskine): Was there more than one person who came to help Mr. Marshall, or was there only one person who came to help Mr. Marshall?

(Question reiterated by the interpreter.)

The Interpreter: He says he is not able to answer that question. There was somebody helping him, but if there was one person or if there was more he cannot recall.

Q. (By Mr. Erskine): And you can't state whether or not that person was the captain of the ship? [79]

(Testimony of Jan Arthur Nelson.)

A. (By the Witness, in English): No.

Q. You cannot recollect?

A. I cannot recollect.

Q. Now, just to make sure, when you saw Mr. Marshall on the lower platform of the gangway, did you see anybody else on the gangway behind Mr. Marshall?

A. I just see Mr. Marshall when he jumped and went down the gangway, down to the platform, and then I yelled, "Don't jump," but he just jumped.

Mr. Erskine: I ask that the answer go out, if the Court please, as non-responsive to my question. I would like to have the question reread, and I would like to have it translated to the witness so that I will be sure of what the answer is.

The Court: Read the question, Mr. Reporter.

(Question read by the reporter.)

The Court: Translate that to him, and translate his answer into English.

(Question reiterated to the witness by the interpreter.)

A. (Through the Interpreter): I didn't see anybody behind Mr. Marshall when he came down the gangway.

Q. (By Mr. Erskine): Did you see anybody at the top of the gangplank, on the top platform of the gangway, at the time you saw Mr. Marshall jump?

A. I just looked for Mr. Marshall, that's all I do, but [80] where the other people come——



(Testimony of Jan Arthur Nelson.)

Mr. Erskine: I ask that the answer go out, if the Court please, as being non-responsive.

Mr. Gerhardt: I submit it is responsive, your Honor. He is explaining what he look at.

Mr. Erskine: I want to find out from him whether or not he saw anybody on the top platform of the gangway at the time Mr. Marshall jumped.

The Interpreter: Shall I translate?

Mr. Erskine: Yes.

(Question put to the witness by the interpreter.)

The Interpreter: He didn't notice that.

Q. (By Mr. Erskine): Didn't notice anybody?

Now, before you saw Mr. Marshall jump you were scraping and painting the ship, were you?

A. Yes.

Q. And was Nordfonn doing the same thing?

A. Yes, sir.

Q. Where was Nordfonn on the barge at the time you saw Mr. Marshall jump? A. Beside me.

Q. Within a yard?

The Witness: What?

(Question reiterated by the interpreter.)

A. (In English): Could be a meter, or half a meter, or [81] something.

Mr. Erskine: It would be stipulated, I suppose, counsel, that a meter is  $39\frac{1}{2}$  inches? I looked it up.

Mr. Gerhardt: So stipulated.

Q. (By Mr. Erskine): Now, I would like to



(Testimony of Jan Arthur Nelson.)

have you come down here, Mr. Nelson, and show me where Mr. Nordfonn was alongside of you at the time you saw Mr. Marshall jump. Just take my pen and put your own initials there and mark it "J.N.-3," where Mr. Marshall was.

A. (Stepping to diagram and marking): I was here and Mr. Nordfonn was beside me.

Q. To your right or your left as you faced the ship? A. To my right.

Q. To your right? A. Yes.

Q. All right. Just put down where he was. About a meter away, you said?

A. About a meter, or half a meter.

Q. Now, just resume the witness stand.

(Witness resumes witness chair.)

Q. And both you and Nordfonn were scraping on the ship at the time you saw Mr. Marshall jump, is that right? A. Yes.

Q. How far out from the ship was the barge at that time?

A. Why, it would be a foot, one and a half feet, or something. [82]

Q. Ordinarily when you scrape and paint on a ship, you scrape and paint from a sling, don't you, on the side of the ship?

(Question reiterated by the interpreter.)

The Interpreter: He says that usually they do it, but when the ship was down there, when they had

(Testimony of Jan Arthur Nelson.)

these barges working alongside, they use these barges as a platform to work from.

Q. (By Mr. Erskine): Now, do you remember—do you recall, Mr. Nelson, that shortly after Mr. Marshall jumped, and when he was picking himself up from the deck of the barge, that the captain shouted to you or Nordfonn to stop pulling on the line that was tied to the after part of the barge and that tied the barge to the ship?

A. (Through the Interpreter): I can't remember that.

Q. Isn't it a fact, Mr. Nelson, that shortly after Mr. Marshall jumped from the lower platform of the gangway onto the deck of the barge the captain shouted to you to stop pulling on the rope that tied the after part of that barge to the ship?

Mr. Gerhardt: I submit, your Honor, the witness has stated he does not remember.

Mr. Erskine: Well, I am asking him.

Mr. Gerhardt: It has been asked and answered.

Q. (By Mr. Erskine): What is the [83] answer? A. I can't remember, I say.

Q. Will you say that that didn't happen?

A. I can't remember.

Q. Will you say that at the time Mr. Marshall jumped onto the barge and when he was picking himself up the captain shouted to somebody on that barge to stop pulling on the rope that tied the after part of the barge to the ship?

(Colloquy between the interpreter and the witness in the Norwegian language.)

(Testimony of Jan Arthur Nelson.)

A. (By the Witness, in English): I can't remember the captain saying that to us.

Q. (By Mr. Erskine): Well, let's leave the captain out of it for a minute, then. Do you recall whether or not anybody, at the time Mr. Marshall jumped onto the barge, shouted to you and Nordfonn, either of you or both of you, to stop pulling on that rope? A. I can't remember.

Q. Will you say that it didn't happen; that that shout was not made?

A. I can't say anything because I don't remember.

Q. Just to make absolutely sure of your testimony, isn't it a fact that after Mr. Marshall had jumped onto the barge, and when he fell and was picking himself up, that someone connected with the ship shouted at someone on the barge not to pull on the rope at the after end of the barge, the rope that tied [84] the after end of the barge to the ship?

(Colloquy between the interpreter and the witness in the Norwegian language.)

The Interpreter: He says he can't remember. He is not able to remember.

Q. (By Mr. Erskine): You do recall, though, Mr. Nelson, that at that time after Mr. Marshall had made his jump you weren't pulling on the rope?

(Colloquy between the interpreter and the witness in the Norwegian language.)

The Interpreter: He says he cannot remember doing that.

(Testimony of Jan Arthur Nelson.)

Mr. Erskine: He can't recall whether or not he was pulling on the rope at the time Mr. Marshall was picking himself up?

The Interpreter: Yes.

Mr. Erskine: He says he cannot recall that?

The Interpreter: He cannot recall that.

Q. (By Mr. Erskine): As I understand your testimony, then, Mr. Nelson, nobody from the ship spoke to you in any way about the rope or about anything else at the time you saw Mr. Marshall coming down the gangway or on the lower platform of the gangway and when he was on the deck? Nobody spoke to you from the deck?

A. No; I say I can't remember nobody.

Q. Nobody? Do you remember when you were first asked, Mr. [85] Nelson, where you were when Mr. Marshall jumped, you drew your finger, or pencil, along this part of the deck of the barge (indicating)—that is, along the deck of the barge opposite the middle hold on the barge? Do you remember doing that?

A. You see, we were looking from this way. At the time Mr. Marshall was standing down on the platform I was——

Mr. Erskine: I didn't hear that.

A. (Continuing): At the time Mr. Marshall was standing down on the platform, I stand right there where he got me to (indicating on diagram).

Mr. Erskine: I ask that the answer go out as being nonresponsive to my question.

(Testimony of Jan Arthur Nelson.)

The Court: It may go out. Have him go down there and point it out.

Q. (By Mr. Erskine): Come down here, Mr. Nelson.

(Witness steps to diagram.)

Q. What I asked, Mr. Nelson, is this: When you first started to testify this afternoon and you were asked where you were on the barge when Mr. Marshall jumped, you drew your finger along that part of the deck of the barge that is opposite the center hold.

A. Yes, when Mr. Marshall went down on the platform I was standing right here (indicating).

Q. Yes. You recall that quite well, do you? You remember that very well? [86]

A. What?

Q. You remember where you were on the barge at the time Mr. Marshall jumped very well, don't you?

A. I stay here.

Q. Do you recall that well?

A. Yes.

Q. You can go back to the stand.

(Witness resumes witness chair.)

Q. You recall that fact very well, Mr. Nelson, but you don't recall who the man was who helped Mr. Marshall to his feet, do you?

(Witness shakes head in a negative manner.)

Q. You don't? You have to answer.

A. No.

Q. When did you arrive here from Bergen?

A. Saturday afternoon.



(Testimony of Jan Arthur Nelson.)

The Court: When?

The Witness: Saturday.

The Interpreter: Saturday afternoon, he says.

Q. (By Mr. Erskine): Did you talk to Mr. Gerhardt after you arrived here? A. Yes.

Q. Did he show you at that time a sketch of the deck of the barge and the gangway?

A. Yes. [87]

Q. And did he ask you at that time to point out to him where you were on the barge at the time Mr. Marshall jumped?

A. He tell me to tell the truth.

Mr. Erskine: I ask that the answer go out.

The Court: What was the answer?

Mr. Erskine: He said Mr. Gerhardt told him to tell the truth.

Q. What I asked you, Mr. Nelson, was whether or not at the time you talked with Mr. Gerhardt, and at the time you had this sketch before you and him, he asked you to point out to him where you were on the barge at the time Mr. Marshall jumped? Did he? A. Yes.

Q. What is the answer? A. Yes.

Q. At that time you pointed out to Mr. Gerhardt approximately the same place on the barge that you pointed out to us this afternoon, is that right?

A. Yes.

Mr. Erskine: I think that is all, your Honor.

The Court: Any questions?

Mr. Gerhardt: I have no questions, your Honor.

The Court: How old are you?



(Testimony of Jan Arthur Nelson.)

A. Twenty-four, sir.

Q. Twenty-four? How long have you been going to sea?

A. Nearly five years.

Q. You have been in this country before?

A. I have been in San Francisco before, yes, with the Hardanger.

Q. Would you sooner live here than in Norway?

A. It is better to live here, yes.

Q. Why don't you stay?

A. I got my work back home, and my wife and child.

Q. Why don't you bring them over?

A. Costs money.

Q. How much money do you make on the ship?

A. It is better to live on shore when you are married.

Q. Where are you working?

A. In a warehouse in Bergen.

Q. What is your salary there a week?

A. About 200 kroner. That makes about \$30.00 a week.

Mr. Erskine: I would like to ask one more question—just one more.

The Court: Under the circumstances I will allow it.

Q. (By Mr. Erskine): Did you read Mr. Nordfonn's deposition before you testified?

A. No, I didn't.

Mr. Erskine: That is all.

The Court: Step down.

(Witness excused.) [89]

Mr. Gerhardt: If your Honor please, my next witness will be through the deposition of Alfred Kaldefoss, and I should like to read that testimony.

This is a deposition, if your Honor please, taken in my office on June 18, 1956, pursuant to the usual stipulations. The direct examination was by myself, and we proceeded as follows:

(Thereupon, the deposition of Alfred Kaldefoss was read into the record.)

Mr. Gerhardt: I will ask that that deposition, your Honor, be introduced in evidence.

The Court: It may be marked.

(Deposition of Alfred Kaldefoss admitted into evidence as Defendant's Exhibit B.)

Mr. Gerhardt: Then I should like to read the deposition of Bjarne Sellevald. This is a deposition also taken by stipulation on June 18, 1956, and at that time the questions on direct examination by myself are as follows:

(Thereupon, the deposition of Bjarne Sellevald was read into evidence.)

Mr. Gerhardt: I will ask that this be introduced as our exhibit next in order.

The Court: It may be admitted and marked.

(Deposition of Bjarne Sellevald admitted into evidence as Defendant's Exhibit C.) [90]

Mr. Gerhardt: We have just one more deposition which we can read the first thing in the morning.

The Court: Take an adjournment to 10:00 o'clock tomorrow morning.

(Thereupon, this cause was adjourned to Tuesday, February 19, 1957, at the hour of 10:00 o'clock a.m.) [90-A]

Tuesday, February 19, 1957—10:00 A.M.

The Clerk: Marshall vs. Westfal-Larsen Company, further trial.

Mr. Erskine: If your Honor please, I have arrived at an arrangement with Mr. Gerhardt before the trial with respect to one of the allegations of the complaint, and Mr. Gerhardt agreed to stipulate to it and I neglected to mention it.

I would like to have the record show that it is stipulated between Mr. Gerhardt and one that the transportation of the plaintiff on this steamer Hardinger by the Westfal-Larsen Company was conducted by that company as a regular, scheduled transportation as a common carrier for hire.

Mr. Gerhardt: So stipulated. And if your Honor please, before we proceed, in checking the record I note that my Exhibit B, which was the deposition of Kaldefoss and which has been introduced in evidence, contains a diagram which is attached to the deposition and which I would like to offer as a separate exhibit next in order.

The Court: It may be admitted and marked.

(Diagram in Defendant's Exhibit B admitted into evidence as Defendant's Exhibit D.)

Mr. Erskine: As I said yesterday, your Honor, our doctor, Dr. King, could not come yesterday so with the Court's permission and counsel's permission, I will put him on now. [91]

Dr. King, will you take the stand, please?

DR. DON KING

called as a witness on behalf of the libelant, being first duly sworn, testified as follows:

The Clerk: State your name for the record, please.

The Witness: Dr. Don King.

Direct Examination

By Mr. Erskine:

Q. You are an orthopedic surgeon, Doctor?

A. Yes.

Q. Do you live in San Francisco?

A. Yes, sir.

Q. And as I said, you are an orthopedic surgeon?

A. Yes.

Q. You are with the Stanford Hospital?

A. Yes.

Q. Are you a professor with the hospital?

A. Yes, I am a professor in orthopedic surgery there at the Medical School.

Q. How long have you been in that position, Doctor?

Mr. Gerhardt: I will stipulate to the doctor's qualifications, your Honor.

The Witness: Oh, about 20 years.

(Testimony of Dr. Don King.)

Q. (By Mr. Erskine): About 20 years?

A. Yes.

Q. Now, Doctor, did you see the plaintiff in this case, Mr. [92] Harry L. Marshall, around March 3rd of 1955? A. Yes.

Q. And did you examine his left knee at that time? A. Yes.

Q. Will you describe to the Court the condition of the knee as disclosed by your examination at that time?

A. Yes. Mr. Marshall was complaining of pain in the knee, and he was having a good deal of trouble walking on it because of paining and his inability to straighten the knee out. It was bent up under him so that he couldn't straighten it out. When I examined his knee, I found that it was swollen——

Q. It was what?

A. It was swollen and very tender to pressure around the joint, and he was unable to straighten the knee out.

Q. I think you doctors describe that as saying that the knee was in a flexed position?

A. Yes.

Q. And was locked in that position?

A. Yes.

Q. That is, he couldn't straighten it out?

A. That is right.

Q. Was there any blood in the knee?

A. Yes. Well, first I took some X-rays and the

(Testimony of Dr. Don King.)

X-rays did not show anything in the way of a broken bone, so then I took a needle and I aspirated the knee and I got out about an ounce, [93] 30 c.c.'s of bloody fluid, from the joint.

Q. Was that serous fluid?

A. No, it was a bloody fluid.

Q. I beg your pardon? A. A bloody fluid.

Q. Now, at that time did you arrive at some diagnosis as to what was wrong with the knee?

A. Yes; we thought he probably had a torn cartilage in the knee, and so we entered him into the hospital and on March 7th of 1955, I operated upon the knee.

I found that the cartilage, although it was quite loose, was not actually locking the knee, but that he did have a torn ligament called the Cruciate ligament in the knee, and I think that was really the cause of the locking more than the cartilage.

Q. That was the anterior cruciate ligament?

A. Yes, that is it.

Q. And what was the condition of that ligament?

A. It was torn away from its attachment.

Q. Was it broken?

A. Yes, it was torn in two like you would pull a string in two, you might say.

Q. Just as though a string had been pulled in two, is that right? A. Yes. [94]

Q. The cruciate ligament had been pulled in two?

A. Yes, that's right.

Q. Now, Doctor, I am not familiar with these things, and it may be that the Court doesn't know



(Testimony of Dr. Don King.)

exactly what that ligament is, so I got hold of a medical book and I would like to mark a page of this book for identification, with the understanding that I can take a photostat of that page and substitute the photostat for the page of the book, if there is no objection.

Mr. Gerhardt: I have no objection, your Honor.

Mr. Erskine: I wonder if you would mark that page for identification?

(Page marked Libelant's Exhibit 5 for identification.)

Mr. Gerhardt: For the record, that is a page of what book, Mr. Erskine?

Mr. Erskine: It is page 242 of a German book.

The Court: Of a what?

Mr. Erskine: Of a German book.

The Court: Well, what's the matter with our own books?

Mr. Erskine: Well, I don't know. This was given to me, your Honor. I suppose it would have been better to get a book in English.

The Court: Well, we have one here in the library. We will have no trouble on that score.

Mr. Erskine: "Handatlas Der Anatomie Des Menschen."

Mr. Gerhardt: It is written in German, too. Do you [95] understand that?

Mr. Erskine: Can't read a word of it. Some of it is written in Latin. I can make out a little bit of it.

(Testimony of Dr. Don King.)

The Court: I am not altogether sure that you are not trying to confuse me.

(Laughter.)

Q. (By Mr. Erskine): Well, Doctor, showing you Plaintiff's Exhibit 5, is that a correct representation of the knee joint? A. Yes.

Q. It is more than life size, though, is that right?

A. This is more than life size?

Q. Yes. A. Oh, no.

Q. Would you point out in that picture, and mark with a pencil, if you don't mind, the ligament that you say was broken like a string might be broken?

A. It is this one right here. That is labeled "Ligamentum Cruciatum Anteriorus"—the anterior cruciate ligament. That's the one that was broken, just about across there.

Q. Mark that——

A. (Interposing): I will put a circle around it.

Q. Will you mark that a little more distinctly where it was broken?

The Court: It doesn't show in the X-ray at all?

The Witness: The ligament is soft tissue, so that doesn't [96] show in the X-ray, no.

Q. (By Mr. Erskine): Now, Doctor, I think you said that the operation disclosed that ligament, the anterior cruciate ligament, had been broken across as a string is broken. Now, what else—did you find anything else as a result of the operation?

(Testimony of Dr. Don King.)

What else did the operation disclose in respect to the condition of the knee?

A. The anterior horn, or the front part of that cartilage, is a little loose; but the chief pathology, the chief trouble, I think was that torn ligament, as I remember it.

Q. And what did you do to repair the damage, Doctor?

A. Well, we just stitched it together there where it was torn.

Q. Did you find any blood fluid in the knee when you operated?

A. Yes, there was a little extra bloody fluid in the knee when we operated on it, although I had removed most of it with the needle before, two or three days before.

Q. But you found some blood there when you operated?

A. Yes.

Q. That wasn't normal blood in that locality, but it leaked into the locality?

A. Yes.

Q. In other words, the knee was constantly seeping a little blood, is that correct?

A. Well, I guess you would say that, or it was just a bloody fluid which was still there from the original injury. I don't [97] know that it would be constantly seeping at that late date after the injury.

Q. Well, the fact is that from time to time blood had been aspirated from the knee.

A. Yes. Oh, from his knee?

Q. Yes.

A. I don't know. I only aspirated it once and I

(Testimony of Dr. Don King.)

can't remember whether the doctors down in South America aspirated it or not. I don't remember that point.

Q. If we assume that from time to time blood had been aspirated from his knee on prior occasions and it had again accumulated, would it be your opinion that blood was seeping constantly from the wound into the knee?

A. I don't think so. I think that the—You see, the knee is like the lining of the mouth. There is a membrane lining the knee joint and it keeps on secreting fluid, and I think that the blood that was in the knee probably accumulated there just within, say, a week after the accident, but it kept on secreting this fluid, which would remain bloody for months afterward. A little bit of blood in the knee joint will remain there for a long, long time and will color any fluid which subsequently is secreted by the lining membrane.

Q. I see. What ordinarily happens to that fluid? Is it carried off through the system?

A. Slowly, over a period of perhaps three or four months it [98] generally absorbs, yes.

Q. But the thing I don't understand, Doctor, is this: From time to time Marshall's knee was—there was an accumulation of some sort of fluid in the knee that looked like blood that was aspirated.

A. Yes.

Q. That doesn't take place in the normal knee, does it?      A. No.

Q. Why would it take place in his knee?

(Testimony of Dr. Don King.)

A. Well, because of the injury.

Q. Because of the injury?

A. Because of the trauma, the injury, which irritated the knee, tore the cruciate ligament, and here this ligament was flopping about in the knee and continually irritating the synovial membrane, this membrane that lines the capsule of the joint.

And any time the synovial membrane is irritated, it will secrete extra fluid. It is Nature's way of. I suppose, protecting the joint and keeping the individual from moving it too much. It fills it up with fluid.

Q. It was the irritation of the membrane that caused the accumulation of fluid? A. Yes.

Q. Now, have you testified as to what you did to repair the damage?

A. I think I said that I stitched the ligament together. [99]

Q. And that was the essence of it?

A. That was the essential or basic principle of the operation. We stitched the cartilage down snugly, but repairing the cruciate ligament, I believe, was the essential thing which had to be done in this case.

Q. You stitched the ligament together?

A. Yes.

Q. And that was the main part of the operation?

A. Yes.

Q. Now, I suppose that when that was accomplished and when the cartilage was taken care of in the way you have described, you sewed the wound up and that was the end of the operation?



(Testimony of Dr. Don King.)

A. Yes, sir.

Q. Now, what treatment did he have after the operation, Doctor?

A. Well, after the operation, of course, we applied a bandage, a snug, thick compression bandage, for a time, until the soft tissues were healed, and then we gave him what is called physiotherapy or physical therapy in an effort to restore movement to the joint, restore power to the musculature of the thigh. and so on, exercises, and so on.

Q. And what did the physiotherapy consist of?

A. Well, the application of heat, a heat lamp, electric pad, or something of that sort. Possibly a little massage. But more particularly exercises to build up the muscles. [100]

When a knee has been injured and has not been used properly over a period of time, the muscles around the knee shrink. They undergo what is called atrophy. So therefore, once you get the knee joint repaired, it is essential that you start the patient exercising this musculature in order to build it up so that he will have a strong leg to bear his weight upon, and that, I think, is basically what Mr. Marshall had, as I remember it.

Q. He lifted weights with his foot, did he?

A. Weights were fastened to a special shoe that they use. The patient has to lift these weights with the muscles on the front of the thigh in order to strengthen them.

Q. And he went through that physical therapy, did he, Doctor, as you have described?

(Testimony of Dr. Don King.)

A. Yes.

Q. Now, when was the last time that you saw him in the year 1955? Was it October 20th?

A. The last note I have is on October 20, 1955.

Q. And what was the condition of the knee at that time?

A. Well, my note, I think, describes it. I have here, "Comes in for checkup. No complaints. Knee exhibits a full range of motion. Good stability. No swelling, discharged." That's all I have down.

Q. There was some scar tissue left over this wound, I suppose?

A. Oh, yes, there is always a scar where you make an incision. [101]

Q. And I mean in the ligament itself where you sewed it together, I suppose that has scar tissue?

A. Oh, yes.

Mr. Erskine: I think that is all.

### Cross-Examination

By Mr. Gerhardt:

Q. Doctor, the note you have referred to during your direct examination, are those your own office notes? A. Yes.

Q. You have used that to refresh your recollection of your treatment and diagnosis?

A. Yes.

Q. Of Mr. Marshall? A. Yes.

Q. May I have a look at those, please?

A. Certainly (handing document to counsel).

(Testimony of Dr. Don King.)

Q. While I am quickly going through these, Doctor, let me ask you this question: Did you find that the knee healed quite rapidly following the operation?

A. Yes.

Q. And is it necessary that the soft tissue should be satisfactorily knitted before you place a patient, like Mr. Marshall was, on any exercise regime?

A. Yes, you don't get very good results unless you wait until the healing process is well established. Otherwise, they [102] have a lot of pain.

Q. I see. And when was it that the exercises regime was started?

A. I am sorry, I can't remember exactly.

Q. Do you have that in your notes?

A. I can look and see whether I have anything like that down or not. Well, I have got. "Continue with physiotherapy" there on 5/5/55. I am afraid I don't have down exactly when we started it. On March 31, which would be about—let's see, when did I say we operated on it—approximately three weeks afterwards, the quadriceps muscle is thin. Oh, here it is.

Q. That would be 3/31. And that would be the date, then, that you felt that the soft tissues had satisfactorily knitted so that you could start the physiotherapy?

A. Yes, somewhere around there.

Q. Doctor, I am looking at some notes which apparently were made in 1947. Was that a leg injury?

A. Yes, he had a mild tear of his gastrocnemius

(Testimony of Dr. Don King.)

muscle. That's the calf muscle. That was in 1947, or whenever it was.

Q. And was that to the right leg or the left leg?

A. Right.

Q. Right leg? A. Yes.

Q. Was there any involvement of the left leg in that case? A. No. [103]

Q. Did you have any other history of any prior injury to the left knee or left leg?

A. No, not that I can recall.

Q. Was there any scar on the left knee from any prior injury, or any evidence of any prior injury?

A. No.

Mr. Gerhardt: That is all.

Mr. Erskine: No further questions.

(Witness excused.)

Mr. Erskine: Well, I am going to ask Mr. Marshall just one or two questions, if the Court please. Shall I do it now?

Mr. Gerhardt: Well, have you finished your case in chief? I would suggest I proceed with the defense, and then if you want to put him on for rebuttal, Mr. Erskine——

Mr. Erskine: Yes.

Mr. Gerhardt: If your Honor please, we have one more deposition of a witness from the vessel. This is Mr. Nordfonn's deposition.

This is the deposition of Kjell Nordfonn, which was taken by stipulation on June 18, 1956. The examination was as follows by myself:

Mr. Erskine: Pardon me. This witness was examined through an interpreter.

Mr. Gerhardt: That is right.

(Thereupon the deposition of Kjell Nordfonn was read into [104] the record and subsequently admitted into evidence as Respondent's Exhibit E.)

Mr. Erskine: Mr. Marshall, please.

The Clerk: Harry L. Marshall to the stand, heretofore sworn.

HARRY L. MARSHALL,

recalled as a witness, being previously sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Erskine:

Q. Mr. Marshall, you testified yesterday you signed this ticket, Defendant's Exhibit A? That is correct, is it not? A. Yes, sir.

Q. When you signed that ticket, did you read it?

A. I signed for this at the General Steamship Line office and gave them my check, and when they handed it to me, I glanced at it, and then I assumed everything was ethical and I didn't read it; I just signed it.

Q. Now, you glanced at the front of it, did you?

A. Yes, and I turned it over.

Q. You notice there is a lot of fine print on the back of it. Did you try to read the fine print on the back of it at all?



(Testimony of Harry L. Marshall.)

A. No, I just glanced at it and signed it.

Q. Now, Mr. Marshall, I show you a letter here dated May 8, 1955, and signed B-j-a-m-e. I think that's the signature. [105] Whose signature is that on that letter?

Q. That is the signature and the first name of the captain.

Q. Captain Sellevald? A. Yes.

Q. The captain of the Hardinger when you were aboard? A. Yes.

Mr. Erskine: I would like to offer this letter and ask it be admitted into evidence.

Mr. Gerhardt: I object to the introduction of the letter, if Your Honor please, for the following reasons: There is no opportunity to examine the captain in respect to this letter. It bears a date which is in advance of the date when the deposition was taken. If this letter was in the possession of the libelant and his counsel at the time the captain's deposition was taken, use could have and should have been made of it at that time.

The captain is not a party to this action. He was originally named as a party but he was never served.

I therefore submit, if Your Honor please, it is improper to introduce a letter at this time from the captain in view of the fact that there is no opportunity by cross-examination of the captain or direct examination to ascertain the circumstances and the explanation behind the letter.

The Court: Let it be admitted and marked for the purpose of identification. [106]

(Testimony of Harry L. Marshall.)

(Letter referred to marked Libelant's Exhibit 6 for identification.)

Mr. Erskine: I might say that the only reason I am offering the letter at this time is in relation to this admission that Mr. Marshall made to the captain after the accident occurred. That is the main purpose, to rebut the effects of that admission.

The Court: For that limited purpose I will allow it, subject to your motion to strike and over your objection.

(Libelant's Exhibit 6, heretofore marked for identification only, admitted into evidence for the limited purpose indicated.)

Mr. Erskine: May I have the letter, Your Honor? This is addressed, "To My Dear Harry," May 8, 1955.

(Thereupon Libelant's Exhibit 6 was read into the record by Mr. Erskine.)

Mr. Gerhardt: I renew my objection, Your Honor, and move to strike the letter, it being merely an attempted admission of evidence from a person who is not a party and which is not binding upon the respondent in this case.

The Court: Do you wish to argue it?

Mr. Erskine: Well, no, I will submit it.

The Court: I think counsel's legal position is correct. Motion will have to be granted.

(Testimony of Harry L. Marshall.)

(Libelant's Exhibit 6, heretofore admitted for the limited [107] purpose indicated, stricken.)

Mr. Erskine: That is all.

### Cross-Examination

By Mr. Gerhardt:

Q. Mr. Marshall, did you ever have a prior injury to your left knee?

A. I think in my deposition I said when I was about 12 years old I skidded on a motorcycle. I had a surface burn and there is a slight scar on the knee from the surface burn.

Q. On the knee?

A. On the knee, which I can show you. I have had it since I was about 14.

Q. If I may, with Mr. Erskine's permission, there was one item of your testimony which you gave yesterday, Mr. Marshall, which I am a little confused about, and that is in respect to the time you first went down the gangway and the captain, as I remember your testimony, started to follow you and then he returned to the top of the gangway.

A. Yes, that's my recollection.

Q. Yes. Now, at that point were you about half way down the gangway?

A. I was about, I would say, between half way and three-quarters of the way down.

Q. And how long did you wait there for the captain?

(Testimony of Harry L. Marshall.)

A. As I recollect, I waited until I saw him start down.

Q. Would that be a minute or two? [108]

A. Well, I can't remember how long he talked to Kaldefoss, but I would say it was a short time, about maybe a minute.

Q. And what did you do during that period of time?

A. I looked up at him and I looked down at the barge.

Q. Now, then, after he started down the gangway for the second time and you went ahead to the lower platform, did you wait on the lower platform any period of time at all while the captain was coming down?

Mr. Erskine: Are you commencing another cross-examination, Mr. Gerhardt? Just a second, Mr. Marshall. Is counsel commencing another cross-examination?

Mr. Gerhardt: No.

The Court: I will give you the same privilege.

The Witness: As I testified before, and also in the deposition, I stood on that lower platform for several seconds, and the captain was coming down, and when he got to the—about three steps of me and didn't say anything and I heard no orders from anybody, I jumped onto the barge.

Mr. Gerhardt: That clarifies the question I had, thank you.

Mr. Erskine: That is all.

(Witness excused.)

Mr. Erskine: No further testimony, Your Honor.

The Court: Matter submitted on both sides, gentlemen?

Mr. Erskine: Well, I would like to argue it.

The Court: On the evidence?

Mr. Gerhardt: Yes.

Mr. Erskine: Yes.

The Court: That is all the testimony? We will take a recess.

(Short recess.)

(Thereupon closing arguments were presented by respective counsel.)

### Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 110 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed June 20, 1957.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk for the United States District Court for the Northern District of Cali-



fornia, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court in the above-entitled case and that they constitute the record on appeal as designated by the attorneys of the appellant;

Complaint to recover for personal injuries.  
Answer.

Proposed Amendments to Findings of fact  
and Conclusions of law.

Findings of fact and conclusions of law.

Decree.

Reporters Transcript, Feb. 18, 19, 1957.

Exhibits 1 to 6.

Exhibits A to E.

Notice of Appeal.

Order for Transmission of exhibits.

Designation of Record on Appeal.

In witness, whereof, I have hereunto set my hand and affixed the seal of said District Court this 26th day of June, 1957.

[Seal]

C. W. CALBREATH,  
Clerk.

/s/ WM. J. FLINN,  
Deputy Clerk.

[Endorsed]: No. 15611. United States Court of Appeals for the Ninth Circuit. Harry L. Marshall, Jr., Appellant, vs. Westfal-Larsen & Co., General Steamship Company and Bjarne Sellevold, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: June 26, 1957.

Docketed: June 28, 1957.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

of his damages, but such portion thereof as should be allowed him under the circumstances.

4. The trial court's conclusion of law that libelant is not entitled to recover any damages from respondent is clearly erroneous; the evidence shows without any substantial conflict that libelant is entitled to recover damages from respondent.

ERSKINE, ERSKINE &  
TULLEY,

By /s/ MORSE ERSKINE,

/s/ MORSE ERSKINE,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 28, 1957.